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No. 86-852

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

J. VINCENT APRILE, II and
JULIE NAMKIN - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. 86-852

J. VINCENT APRILE, II and
JULIE NAMKIN - - - - - *Petitioners*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

The Respondent, Commonwealth of Kentucky, requests that the Court deny the petition for a writ of certiorari to review the Opinion and Order of the Supreme Court of Kentucky entered in this proceeding on September 25, 1986, which order had denied reconsideration of an earlier order of the Supreme Court of Kentucky entered on August 7, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to those constitutional provisions set forth by Petitioner, the following provisions of the Constitution of the Commonwealth of Kentucky are also involved.

Section 109 of the Kentucky Constitution provides, in relevant part, as follows:

> The judicial power of the Commonwealth shall be vested exclusively in one Court of Justice which shall be divided into a Supreme Court, a Court of Appeals, a trial court of general jurisdiction known as the circuit court and a trial court of limited jurisdiction known as the district court.

Section 115 of the Kentucky Constitution provides, in relevant part, as follows:

> Procedural rules shall provide for expeditious and inexpensive appeals.

Section 116 of the Kentucky Constitution provides, in relevant part, as follows:

> The Supreme Court shall have the power to prescribe rules governing its appellate jurisdiction, . . . and rules of practice and procedure for the Court of Justice.

COUNTERSTATEMENT OF THE CASE

While the factual account of the events leading up to this present controversy is for the most part correct as supplied by Petitioners, there are some very crucial inaccuracies which must be corrected. Additionally, the Petition which has been filed herein contains, both in its Statement of the Case and in its Argument, certain factual assertions which are not supported by any evidence in the record below. For the purpose of clarifying the events at the June 24, 1986, show cause hearing before the Supreme Court of Kentucky, a transcript of that hearing is provided in the appendix to this brief. (Hereinafter cited at "T.R. —") This show cause hearing was necessitated by the Petitioners having failed to file a brief at the conclusion of a ten month extension after the expiration of the original time for the filing of the brief. (The original motion of Petitioners for an extension is set forth in Appendix, pp. 27a-31a; the order of the Supreme Court of Kentucky to make a timely filing or show cause is set forth in Appendix, p. 32a) Despite having been under a show

cause order should they fail to timely file their brief during the ten months prior to June 2, 1986, Petitioners instead chose to wait until the very last day of that period to file a motion for a further extension rather than filing the brief which had been so long ordered to be filed. (The second motion of Petitioners for an extension of time is set forth in Appendix pp. 33a-38a; a colloquy between Petitioner Aprile and the Justice Liebson of the Supreme Court about Petitioners having waited until the very last day to move for an extension appears at T.R. 17-18).

At the show cause hearing before the Supreme Court of Kentucky, it was disclosed that Petitioner Aprile had not, even at that point thirteen months after the certification of the record, read the record. (T.R. 6) Indeed, written work on the brief had not even begun as of that date. (T.R. 40) As Petitioner Aprile phrased the matter, work had not begun on the "actual final product of the brief." (T.R. 8) Following their being held in contempt, Petitioners completed work on the brief in five months and the appeal "brief" (if a document *358* pages in length can be called a "brief") was finally filed on November 2, 1986, after the Supreme Court of Kentucky had granted a motion for leave to file a brief in excess of the fifty page limit set by C.R. 76.12(4)(6).

SUMMARY OF ARGUMENT

I. *The petition for the writ should be denied as having been sought on frivolous grounds.* Petitioners have not sought the writ of certiorari to vindicate any

constitutional rights but rather to subvert the ability of the Kentucky court system to control the flow of appeals being prosecuted by publicly funded counsel. Petitioners apparently seek to obtain relief in this proceeding so that it can be combined with the holdings of this Court in *Evitts* v. *Lucey,* 469 U. S. 387 (1985) and the Sixth Circuit in *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir., 1980). The net result of those two prior cases, if coupled with an outcome herein favorable to Petitioners, would be to leave the Supreme Court of Kentucky either unable to force the expeditious treatment of appeals on its docket or to embroil it in a controversy with the executive and legislative branches of state government. A further effect would be to leave criminal defendants such as the one represented by Petitioners below without access to an expeditious appeal, a matter about which Petitioners concede such persons to be concerned . (T.R. 28)

II. *The holding of Petitioners in criminal contempt of the Supreme Court of Kentucky was not violative of due process and was an appropriate exercise of the criminal contempt powers of the Court.* Petitioners have undermined the Supreme Court of Kentucky's ability and duty, as manifested in the Constitution of the Commonwealth of Kentucky to control the appellate processes of the state. For such actions, Petitioners were rightly held in contempt of court by the Supreme Court of Kentucky. In the finding of Petitioners in contempt, the Supreme Court of Kentucky followed constitutionally sound procedures for such proceedings before an appellate level court. Such

sufficient procedures consisted of notice, opportunity to be heard and a result with findings and conclusions based upon evidence introduced into the record of such proceeding.

III. *The decision of the Supreme Court Of Kentucky to hold Petitioners in contempt was not violative of any rights to effective assistance of counsel.* The right to counsel argument of Petitioners should not be considered by the Court for the reason that such argument was not raised in the proceeding below and is not supported by any evidence in the record of this proceeding. 28 U.S.C. 1257(3); *Crowell* v. *Randell,* 10 Pet. 368 (1836). Such argument should further be rejected for the reason that Petitioners lack standing to make such argument. Even should the argument be considered properly raised, the argument is spurious because this Court has expressly indicated that application of sanctions against attorneys is an available option to state courts in situations where sanctions could not be applied to the clients of said attorneys without violation of the constitutional right to effective assistance of counsel. *Evitts* v. *Lucey,* 469 U. S. 387 (1985).

REASONS FOR DENIAL OF THE WRIT

I. The Petition for the Writ Should be Denied as Having Been Sought on Frivolous Grounds.

The currently pending petition should be denied on the grounds demonstrated, *infra,* that the due process—contempt arguments of Petitioners are frivolous because they are inapplicable to the facts at hand. Of even more importance to the maintenance of judicial

integrity is that this proceeding is pressed by Petitioners not to vindicate their due process rights but rather to usurp the power of the Supreme Court of Kentucky to control the process of regulating the flow of cases through the state's appellate structure. In Kentucky, the power to make rules applicable to such proceedings is vested by Section 116 of the Kentucky Constitution in the Supreme Court of Kentucky. Indeed, in regard to appellate proceedings, the Supreme Court of Kentucky is *required* to provide rules which will "provide for expeditious and inexpensive appeals." Ky. Const. Sec. 115. As Justice Leibson observed at the show cause hearing, the Supreme Court of Kentucky has "a duty to maintain the authority of the Court" over such matters. (T.R. 18) This is a power which has been held to be exclusively within the judicial power in Kentucky, excluding even interference by the Kentucky legislature. *Commonwealth* v. *Schumacher,* 566 S. W. 2d 762 (Ky. App., 1978) Indeed, it would be fair to say that this case is *not* about due process but in reality involves a power struggle over control of the process of appellate advocacy in public counsel criminal cases. It further is the case that always present in such death penalty cases is the fact that defense counsel often bear philosophical opposition to the penalty and that delay serves, if nothing else, to prevent the carrying out of the sentence.

The issue which lurks behind this case is that of effective assistance of counsel requirements for criminal appeals being handled by the Office of Public Advocacy. In regard to the situation in Kentucky, the

leading federal cases on point are *Cleaver* v. *Bordenkircher,* 634 F. 2d 1010 (6th Cir., 1980) and *Evitts* v. *Lucey,* 469 U. S. 387 (1985). In *Cleaver,* the Sixth Circuit upheld the issuance of a writ of *habeas corpus* to a prisoner whose appeal had been dismissed when his publicly supplied counsel was denied an extension of time in which to file an appeal brief. The holding was based upon the Sixth Circuit's conclusion that the Sixth Amendment right to counsel was denied when such extension was denied to an attorney whose caseload made it physically impossible for him to file in a timely fashion. In *Evitts,* this Court upheld the issuance of a writ of *habeas corpus* to a prisoner whose appeal had been dismissed for failure of his publicly supplied counsel to file a statement of appeal as required by the procedures of Kentucky. In both cases, reliance was placed upon the right to counsel interpretations of *Anders* v. *California,* 386 U. S. 738 (1967) and *Douglas* v. *California,* 372 U. S. 353 (1963). In light of those two prior cases, the Supreme Court of Kentucky finds itself in a position where it *cannot* deny such "motions" for an extension of time. As Justice Leibson noted about such actions by Petitioners, Petitioners were "telling [the Supreme Court of Kentucky] not that you *need* an extension of time and we should give it to you, but we *have* to give it to you." (T.R. 18, emphasis added)

Petitioners represented a convicted murderer and rapist. In March, 1984, Parramore Lee Sanborn was convicted of capital murder, first degree sodomy, first degree rape and first degree kidnapping; for those

offenses, he was given the death penalty. Fourteen months later, on May 30, 1985, the record in the case was certified for appeal. Following that certification, Petitioners were given until August 2, 1985, in which to file their appeal; they then received a ten month extension coupled with a show cause order if they did not file the brief by June 2, 1986. The due date for the appeal brief was thus thirteen months after the record had been certified on appeal. Instead of filing their brief on June 2, Petitioners on that very due date filed instead a motion for another ten month extension. Given the holdings of the Sixth Circuit in *Cleaver* and of this Court in *Evitts,* the Supreme Court of Kentucky had no choice but to allow Petitioners to continue to delay the filing of the appeal brief. The entry of any sort of sanction against Sanborn himself would have been grounds for a grant of *habeas corpus.* Thus, if the entry of a sanction against Sanborn was the only option open to the Supreme Court of Kentucky, there simply would have been no procedural limit to when Petitioners would be required to file because such sanction would not in fact have been available due to the effective assistance of counsel requirements of *Cleaver* and *Evitts.* The usage of any sanction against Sanborn would have been pointless since reversal of the Supreme Court of Kentucky for such actions would have been inevitable. The "motion" of Petitioners for an extension was not a motion at all—the Supreme Court of Kentucky had no choice but to grant it, as Justice Leibson quite aptly observed. (T.R. 18)

Now with this petition, Petitioners have in effect "dropped the other shoe." The cloak of constitutional "questions" presented does not hide the substance of this ploy. With *Cleaver* and *Evitts* as their base, Petitioners ask this Court to hold that counsel cannot constitutionally be penalized for failure to file briefs in a timely fashion. With no sanction available against their client, the net result is to elevate the Office of Public Advocacy beyond the reach of time constraints. According to this argument, their client could not constitutionally be penalized for failure to file, Petitioners could not constitutionally be penalized for failure to file and, as if by magic, any time constraints upon Petitioners disappeared. Of even greater significance is that not only would time constraints disappear, the ability of the Supreme Court of Kentucky to regulate the state's inferior courts, its appellate process, the actions of its practitioners and the Supreme Court of Kentucky's own processes would similarly disappear. At stake in this case is no less than the question of whether the time periods for filing appeals for criminal indigents in the Kentucky courts will be controlled by the Supreme Court of Kentucky or by Petitioners and those similarly situated.

Indeed, there is no reason to think that the question is limited to time periods for filing appeals; similar tactics would seem equally effective in such other matters as length of the appellate brief, length of time assigned for oral argument and most of the other rules of procedure applicable to the processing of appeals. Usage of the tactic in related areas is amply demon-

strated by the fact that, when Petitioners did finally choose to file a brief for their client, it was *358* pages in length. Such result is not unusual, Justice Leibson having observed that the Supreme Court of Kentucky regularly receives from the office of Petitioner "four or five hundred pages of briefing, most of which isn't even remotely arguable, much of which isn't, instead of focusing on the major points." (T.R. 26) Further compounding such abusive tactics is the fact that it appears that in some cases, briefs from the office of Petitioners have been "cut and pasted" on word processors from prior briefs, with the office at times forgetting even to change the name of the criminal defendant from one case to the other (T.R. 15) or having briefed a criminal offense for which the defendant was not even convicted. (T.R. 15, comment of Justice Wintersheimer) Furthermore, there is no reason to suppose that the guerrilla tactics being perfected by Petitioners will be limited to the Kentucky court system or even to all the other state court systems in the United States. If Petitioners see fit to ignore this Court's five page limitation upon a reply in this case, it is easy to envision the grounds upon which such "right" will be asserted. Even *this Court* may find itself, as did Justice Leibson, "at the mercy of the lawyer, because otherwise we can have a collateral attack." (T.R. 26)

Assuming that what Petitioners really seek in this proceeding is an ability to set their own time schedule for the filing of criminal appeal briefs for indigents, was there any other alternative open to the Kentucky

Supreme Court than to hold them in contempt after a proper hearing? In their Petition, Petitioners state that "The real source of the problem is the burden of overload upon the public advocates." (Petition, p. 13) An additional contributing factor is the policy of Petitioners' office to assign *two* attorneys to death penalty cases and to have *both* attorneys read the entire record. (T.R. 32) In their motion to the Kentucky Supreme Court for reconsideration of the contempt citation, Petitioners stated that "the Commonwealth has not budgeted adequate funds to the Department of Public Advocacy". (Motion for Reconsideration, p. 4) The matter of the funding of the Office of Public Advocacy is a matter over which the Supreme Court of Kentucky has absolutely no control; the funding decision is a political matter about which Petitioner Aprile is very knowledgeable given his frequent appearances before the Kentucky General Assembly as a lobbyist for his office. What is sought herein is either the help of the Supreme Court of Kentucky in securing that which Petitioners' employer could not secure through the legislative process or to visit the consequences of their lobbying failure upon their clients and the court system.

Petitioners in this case have deliberately placed themselves into a position in which the Supreme Court of Kentucky was forced to make a choice among three alternatives: (1) to give up on taking any action against Petitioners, which action when combined with *Cleaver* and *Evitts* would leave the control of the Su-

preme Court's processes virtually in the hands of Petitioners and their colleagues; (2) to embroil itself into the processes of the executive and legislative branches of Kentucky state government by *ordering* that additional funding be provided to the Office of Public Advocacy; or (3) to hold Petitioners in contempt for having created the dilemma with which they attempted to confront the Court. It must be obvious that abdication of control of the judicial process was an unacceptable alternative, not just for the Supreme Court of Kentucky, but for other state courts and for this Court as well. Neither was the second alternative appropriate in a state as firmly committed to the doctrine of separation of powers as is Kentucky, and it would seem equally unacceptable should the tactic be "exported" to the federal system. *See, e.g., Ex Parte Auditor of Public Accounts*, 609 S. W. 2d 682 (Ky., 1980). Thus, only the third alternative remained in view of the usage of two attorneys on the case and absent a showing of any reasonable cause why briefing of the case had not even begun at the time of the show cause hearing. It must be concluded that Petitioners deliberately put themselves into the position to force that choice, that the choice came out the only way that any reasonable appellate court would have chosen and that Petitioners should not now be allowed to escape the fruits of their attempt or to foist those unacceptable alternatives upon the Supreme Court of Kentucky through the help of this Court.

II. The Holding of Petitioners in Criminal Contempt of the Supreme Court of Kentucky Was Not Violative of Due Process and Was an Appropriate Exercise of the Criminal Contempt Powers of the Court.

The ability of the Supreme Court of Kentucky, both under state and federal law, to punish for contempt is well settled.

> The power to punish for comtempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders and writs of the courts, and consequently, to the due administration of justice. *Ex Parte Robinson,* 86 U.S. 506, 509 (1874).

"And such is the recognized doctrine in reference to the powers of the courts of the several States". *Ex Parte Terry*, 128 U. S. 298, 303 (1888). Similarly it is well settled in both state and federal practice that such power is activated by the issuance of a "rule" or a "show cause order". *Ex Parte Robinson, supra,* utilized a show cause order in federal practice and the practice in Kentucky dates back at least to *In Re Woolley,* 74 Ky. 95 (1874), in which such procedure was utilized by the state's then-highest court, the Court of Appeals. There are literally hundreds of reported cases in the federal and state system in the United States which have used the practice commonly and continuously since the founding of this country.

In review of this case, however, it is necessary to keep in mind one very crucial difference between the availability of contempt power in the federal system and the state system. Despite the fact that many fed-

eral cases speak of the authority to punish for contempt as being inherent in the federal courts, there has long been federal legislation applicable to that contempt power. *See,* 18 U.S.C. 401. This federal statutory dimension, which is criminal in nature, probably explains at least in part the long search by this Court for a meaningful distinction between civil and criminal contempt. In the state of Kentucky, there is no legislation which applies any such limits or restrictions upon the contempt power of the judiciary. As a result of this, many of the cases cited by Petitioners in support of the Petition simply have no applicability to the facts at hand. Often a federal case will apply a restrictive view of contempt, not because of any federal constitutional requirement but because of a federal statutory requirement. *See, e.g., In Re McConnell,* 370 U. S. 230 (1962). The effect of the dichotomy between federal statutory provisions and federal constitutional provisions will be that only those United States Supreme Court decisions reviewing state contempt proceedings and those federal decisions based on federal constitutional requirements are applicable herein. In regard to that latter category, even those cases may be of limited authority given the possibility that the due process clause of the Fifth Amendment (which is the constitutional source in federal contempts) may not be exactly mirrored by the requirements of due process under the Fourteenth Amendment (which is the constitutional source in state contempts).

In attacking the finding of the Kentucky Supreme Court that they were in contempt for failure to file a timely brief, Petitioners raise a multitude of arguments, some of which purport to be based on the requirement of Due Process and others of which lack any apparent federal constitutional basis. Whether taken individually or in the aggregate, the contentions of Petitioners are invalid and the Petition should be denied.

A. The Due Process Standards Advanced by Petitioners are Inapplicable to a Contempt Proceeding Before an Appellate Court Such as the Supreme Court of Kentucky.

The Petitioners have advanced a number of bases on which it is alleged that their having been held in contempt by the Supreme Court of Kentucky was in violation of certain due process standards applicable to state proceedings under the Fourteenth Amendment. Included among the alleged violations of due process were such disparate matters as the size of the vote by which they were held in contempt, an alleged failure to specify the elements of their offense, an alleged failure to specify the standards applicable to their conduct, an alleged failure to make findings of fact and conclusions of law and an alleged failure to apply the appropriate standard of proof in the case. While it certainly is true that due process is required in any state court proceeding, including the one below, Petitioners have made a fundamental error in concluding that the standards which they have advanced are the ones which governed the proceeding below. This error on their

part comes from a failure to distinguish between a contempt proceeding before a trial court (with or without a jury) and a contempt proceeding before the highest appellate court of the jurisdiction—here the Supreme Court of Kentucky. The hodge-podge of arguments advanced by Petitioners relating to the technical aspects of the contempt finding are difficult to respond to because of such confusion. In this petty variety of contempt, it is difficult to envision how Petitioners envision the contempt powers of the Supreme Court of Kentucky should be exercised. It would seem absurd for the highest court of the state to in effect charge itself as a trial judge would charge a jury and then to withdraw for consideration as would a jury of laymen. Common sense would indicate that contempt in this appellate setting is fundamentally different than in the setting of trial courts which is common to the cases utilized by Petitioners.

This Court has previously considered the distinction between trial court contempt powers and appellate court contempt powers in *United States* v. *Barnett,* 376 U.S. 681 (1964), in which famous case Ross Barnett, then governor of Mississippi, was held in contempt by the United States Court of Appeals for the Fifth Circuit for disobedience to that court's order that James Meredith, a black person, be admitted as a student at the University of Mississippi. In that case, the Court held that a jury trial was not required in a proceeding to determine contempt regarding a Court of Appeals order, rejecting the argument of Governor Barnett

that a jury trial was required by 18 U.S.C. 402, the Sixth Amendment or the due process clause of the Fifth Amendment. While the apparent conclusion of *Barnett* that there was no right to jury trial in contempts regardless of the punishment has been modified by *Bloom* v. *Illinois,* 391 U. S. 194 (1968), so that a serious contempt would activate jury trial protection, there has been and should be no retreat by this Court from the conclusion that an appellate setting is fundamentally different from a contempt proceeding in a trial court.

In the case at hand, the Supreme Court of Kentucky's usage of the contempt power can most fairly be analogized to the usage of a disciplinary power over a practitioner responsible to that court for his actions taken on behalf of his client. The Supreme Court of Kentucky is charged by Section 115 of the Kentucky Constitution with the duty of providing rules for "expeditious and inexpensive appeals," a duty as surely present in a case where publicly provided counsel handles the appeal as where private counsel is in charge. In the case at hand an expeditious appeal could hardly have been said to be taking place where the three month briefing time (between certification of record in May, 1985, and the original due date in August, 1985) had already been extended for ten months and Petitioners sought still an additional ten month extension. It should additionally be noted that, all the while that Petitioners delayed the preparation of their brief, their client languished in prison. While

their position may be that he thereby escaped issuance of a death warrant, it is equally possible that their appeal might have been successful and that some result culminating in his release might have been obtained. It is not the function of Petitioners to dictate the outcome of a case by their own course of conduct—their duty to the Supreme Court of Kentucky and to their client was to file a competent, professional brief in a timely manner. They violated that duty, gave no good reason for their failure and were quite properly disciplined by the Supreme Court of Kentucky for disobedience.

In the closely related, but obviously more serious, area of attorney discipline, the Court has long required scrupulous obedience by its own practitioners to the orders of the Court. Despite this Court's conclusion that a disbarment proceeding is "quasi-criminal" (*In re Ruffalo,* 390 U. S. 544 [1968]), the Court's own rule provides for a summary procedure in which the burden is placed upon the attorney to show cause why he should not be disbarred. Rule 8; *In re Isserman,* 345 U. S. 286 (1953), rev'd. 348 U. S. 1 (1954). Although the current version of Rule 8 does not expressly so provide, it appears that such decisions are made simply upon a majority vote of the justices of this Court participating. *In re Isserman,* 348 U. S. 1 (1954); Stern, Gressman & Shapiro, *Supreme Court Practice* (6th Ed., 1986), Section 19.8. The reported decisions of the Court seem to indicate that such disbarment decisions are made by the Court simply upon the written filings;

if oral arguments do in fact take place in such proceedings, they appear to be rare. *See, e.g., In re Osborne,* 420 U. S. 918 (1975); *In re Buttles,* 419 U. S. 1101 (1975). The sanction imposed by the Supreme Court of Kentucky upon Petitioners (suspended fines of $500 and $250) falls well below the penalty of disbarment and was issued by procedures (including oral argument) which go far beyond those required by this Court for the policing of its own practitioners.

In the application of sanctions to its own practitioners, this Court utilizes show cause orders in the same fashion utilized by the Supreme Court of Kentucky. Rule 8. Such procedure has been used by this Court to issue a reprimand to an attorney for failure to pay a bill of the Court's clerk for costs. *In re Davis,* 289 U. S. 704 (1933). In such cases, the Court has noted the necessity of giving its "action a punitive quality to make the high obligation of the members of the bar to respect decisions of the Court". *In re Gilbert,* 276 U. S. 294 (1928). In *Gilbert,* the Court suspended from practice for a period of six months a member of the bar who had failed to obey the Court's order that he return a portion of the fee which he had claimed for service as a special master for the Court. Obedience to its orders is every bit as important to the Supreme Court of Kentucky as is obedience to the orders of this Court. The contempt finding against Petitioners was made by the Supreme Court of Kentucky under circumstances which would have similarly moved this Court, had the actions taken place here

rather than in Kentucky, and such findings were made in a manner procedurally identical to those which this Court has used regarding its own practitioners. Such procedures are not violative of any standards of due process and should be upheld by the Court.

B. Petitioners' Due Process Rights Were Not Violated by the Failure of the Supreme Court of Kentucky to Make Findings of Fact and Conclusions of Law.

Petitioners contend that their due process rights were violated by the failure of the Supreme Court of Kentucky in its August 7 order to make findings of fact and conclusions of law. As their basis for alleging such failure to be violative of due process, Petitioners point to provisions of the procedural rules applicable in Kentucky in civil cases (C.R. 52.01) and criminal cases (R.Cr. 9.26[2]). From this, Petitioners reason that "the failure of the Supreme Court of Kentucky to follow its own rules is fundamentally unfair and constitutes a violation of due process". (Petition, p. 11)

It cannot fairly be stated that the Supreme Court of Kentucky has failed to follow its own rules. Initially it should be noted that there exists no Kentucky authority for the proposition that the provisions of the Civil Rules or the Criminal Rules are even applicable to a contempt proceeding before the Supreme Court of Kentucky. Assuming such to be the case, the August 7 order of the Court is in compliance with both rules because the opinion rendered there fairly states the findings of fact and conclusions of law, thus

obviating the need for a separate document embodying the findings and conclusions. C.R. 52.01; R.Cr. 9.26(2).

Even if one would assume, however, that the August 7 order did not in fact comply with the requirements of the Kentucky procedural rules, Petitioners cite absolutely no authority for the proposition that such failure constitutes a violation of due process. The two cases of sister states cited by Petitioners contain no authority for such a proposition. In *Fienup* v. *Rentto,* 74 S. D. 329, 52 N. W. 2d 486 (1952) a South Dakota trial court's contempt finding was reversed for failure to make findings and conclusions as required by established state caselaw; there is not even a hint in the opinion that such findings were required by anyone's standard of due process—state or federal. Similarly in *Hildebrand* v. *Hildebrand,* 32 Wash. 2d 311, 201 P. 2d 213 (1949) a trial court was reversed for failure to make findings required by state law; no portion of the opinion even addresses any question of due process. It is further significant to note that both decisions involve contempt findings by trial courts; it would seem obvious that considerations applicable to trial courts are not directly applicable to proceedings before the highest court of the state.

Even if it were correct that the Supreme Court of Kentucky had failed to make findings and conclusions required by state law, such failure could constitute grounds for review in this Court only of such failure rose to a level of impairment of some right protected by the United States Constitution. This Court is *not*

simply an appellate court with the power to review all of the actions of the Supreme Court of Kentucky. Only those matters which are governed by federal law can here be reviewed. *Murdock* v. *Memphis,* 20 Wall. 590 (1875); 28 U.S.C. 1257(3). No such matter is presented by these facts. The August 7 order of the Supreme Court of Kentucky contains sufficient findings and conclusions; if it does not, such failure is solely a matter of state law which is outside the review of this Court.

C. Petitioners' Due Process Rights Were Not Violated by the Failure of the Supreme Court of Kentucky to Set Forth the Standard of Proof in the Contempt Proceeding Against Petitioners.

Petitioners contend that a violation of due process has occurred in their contempt citation by virtue of the fact that the Supreme Court of Kentucky did not identify what standard of proof was necessary for the finding of contempt. From that alleged failure and the nature of the 4-3 vote of the Supreme Court, Petitioners conclude that a finding of criminal contempt has been entered against them without proof of "guilt" beyond a reasonable doubt, as would be required in criminal cases.

Whatever may be the theoretical difference between criminal contempt and civil contempt, such distinction is insignificant as a practical matter in Kentucky. In modern dealings with the special problems posed by contempt, Kentucky's highest court has observed that such proceedings are in a class by themselves, involving unique aspects and that attempts to apply ordinary

rules of practice and procedure simply cause confusion. *Levisa Stone Corp.* v. *Hayes,* 429 S. W. 2d 413 (Ky., 1968). In the absence of a criminal statute analogous to 18 U.S.C. 401, there is no reason for the state to mirror the great importance placed in the federal system on the distinction between civil and criminal contempt.

Since 1972, Kentucky's judiciary has abandoned the attempt to maintain a practical distinction between civil and criminal contempts, noting that "the long and tortuous effort of the courts to classify contempts as civil or criminal has been a fruitless search for the impossible". *Miller* v. *Veitner,* 418 S. W. 2d 32, 34 (Ky., 1972). Rather than distinguishing between civil and criminal contempts, the Kentucky courts have noted that "[t]he important distinction to be drawn, it seems to us, is between those contempts for which a person cannot be jailed or fined without a jury trial and those for which he can". *Id.* at 35. Since it is clear that the punishments imposed on Petitioners here (fines of $500 and $250, each suspended) did not rise to the level necessary to require a jury trial under the holding of *Bloom* v. *Illinois,* 391 U. S. 194 (1968), it follows that the distinction between the types of contempt is of no importance under state law, and this Court should not reimpose upon the state its long-abandoned search for a distinction between the two types of contempt.

Both this argument and the argument of Petitioners concerning the size of the vote by which they were

held in contempt raise a very difficult practical problem — how to structure such proceedings before an appellate court. If the punishment involved does not activate the right to trial by jury, how is the appellate court to proceed? It seems absurd to require the highest court of Kentucky to in effect "charge" itself as to a standard of proof as a trial judge would charge a jury. In fact, the proceeding is unique enough that it is not actually possible to draw any analogy from criminal trials proceeding at a trial level.

III. The Decision of the Supreme Court of Kentucky to Hold Petitioners in Contempt Was Not Violative of Any Rights to Effective Assistance of Counsel.

Petitioners contend that the usage of the contempt power of the Supreme Court of Kentucky against them for their failure to file a timely brief in this matter constituted a violation of the effective assistance of counsel rights articulated by this Court in *Evitts* v. *Lucey, supra.* This is an argument which is spurious for a number of important reasons, all of which lead to the conclusion that the Petition should be denied.

Of threshold importance is that there is lacking in the record in this proceeding a fundamental requirement relating to the effective assistance of counsel argument of Petitioners—to put matters most simply, the argument was not raised in the record below. In neither their oral argument before the Supreme Court of Kentucky nor their written argument in support of their Motion for Reconsideration did Petitioners raise the effective assistance of counsel argument which they now assert from *Evitts.* The raising of such matter

in the record before the court below is a prerequisite to review authority in this Court upon such proposition. 28 U.S.C. 1257(3) Without such basis in the record below, it cannot be said that such right has been "drawn in question" by the decision of the Supreme Court of Kentucky. This requirement is a fundamental one from which the Court has not deviated since Justice Story was a member of this Court. *Crowell* v. *Randell,* 10 Pet. 368 (1836). Such requirement exists both by act of Congress and by policy of this Court due to the fundamental principal of federalism that it is crucial that state courts be given the first opportunity to pass upon such federal arguments before they are called upon to face review before this Court. *Cardinale* v. *Louisiana,* 394 U. S. 437 (1969). In the absence of a proper raising of the issue in the record below, this argument in the Petition should be treated as a nullity in the consideration of whether to grant the Writ.

In addition to the fact that the effective assistance of counsel argument was not raised below, the usage of such argument before this Court is also defective due to a lack of standing on the part of Petitioners to raise the argument. Although it has been observed that "(g)eneralizations about standing to sue are largely worthless as such" [*Association of Data Processing Serv. Organizations, Inc.* v. *Camp,* 397 U. S. 150, 151 (1970)], the basic notion of "standing" is that no person is permitted to litigate the legal rights of another person. This most fundamental definition of standing

is helpful in this case because the facts at hand are relatively simple. While standing is "determined by the specific circumstances of individual situations" [*U. S. ex rel. Chapman* v. *F.P.C.*, 345 U. S. 153, 156 (1953)], a historical survey of the difficult standing cases shows that their difficulty arose from the fact that the cases by and large involved questions of wide public interest. *See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *Flast* v. *Cohen*, 392 U. S. 83 (1968). The great standing cases involved attempts by peripherally interested persons to litigate matters of public interest in which their lack of close factual connection ran them afoul of the case and controversy requirements of Article III of the United States Constitution. Absent a matter of public interest, people rarely take the time and expense to litigate a matter in which they have no personal stake. Of course, such practical restriction is inapplicable to persons whose salaries and expenses are already borne at public expense.

In the facts at hand, Petitioners lack standing to raise the issue of ineffective assistance of counsel. It is certain that the rights of Petitioners have not been violated in any way. If anyone would suffer from ineffective assistance of counsel, it would have been their client, Mr. Sanborn, and he is not a party to this proceeding. Neither are there any facts in the record below from which it could be concluded that the actions of the Supreme Court of Kentucky impaired in the slightest manner the Petitioners' representation of Mr.

Sanborn. Neither in their Petition nor in any of the proceedings below did Petitioners point to the slightest manner in which such right was factually impaired. The closest thing to *facts* upon which to base such an argument is found in Petitioners' *assertion* that "a chilling effect upon the quality of legal representation may occur". (Petition, p. 13) Given that Petitioners did (finally, and at a time virtually of their own choosing) file a *358* page brief on behalf of Mr. Sanborn, it appears unlikely that Mr. Sanborn's case was handled with any less effectiveness after the contempt citation than it had been prior to that time. There is no factual basis on which to judge the validity of such claim and it must be rejected by the Court.

Even if it were assumed that the contempt sanction invoked against Petitioners did have some bearing upon their ability to represent this or other clients, such action by the Supreme Court of Kentucky still would not be in violation of the effective assistance of counsel rights of Mr. Sanborn. Anticipating that the net effect of *Evitts* might be to impair the ability of states to enforce procedural rules in criminal cases, Justice Brennan outlined (among the "numerous courses remain(ing) open") that "a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client." *Evitts, supra,* p. 399. In this proceeding Petitioners seek this Court to reverse the Supreme Court of Kentucky for taking exactly that course of conduct which the Court indicated was appropriate

in *Evitts*. Without at least the power to impose sanctions against practitioners, the Supreme Court of Kentucky will be left absolutely helpless and at the mercy of what ever conduct Petitioners and other similarly situated may, in their own absolute discretion, believe is appropriate conduct for the defense of their clients. Petitioners assert that actions such as that below have a "chilling effect" upon practitioners; in reality, it is just the excesses of Petitioners and others which have had a negative effect upon appellate practice in Kentucky which goes far beyond any "chilling effect". The tactics of Petitioners have wrought chaos on the Kentucky appellate system and they seek license from this Court to continue and expand those tactics. It was to resist exactly such trend that Petitioners were held in contempt by the Supreme Court of Kentucky and the action was entirely appropriate.

The contempt citation issued below to Petitioners was intended to send a clear message to Petitioners and to other practitioners who had engaged in the past in similar tactics. The message sent by the Supreme Court of Kentucky was that there is an end to the patience of the Court and that all appeals must be processed in a speedy, expeditious fashion, in accordance with the rules and orders of the Court. It was a message deliberately sent and it was absolutely necessary as an action by the Supreme Court of Kentucky in view of the "no-choice" motions with which it was faced in the aftermath of *Cleaver* and *Evitts*.

The imposition of the federal controls in *Cleaver* and *Evitts* makes it wasteful of the time and efforts of all involved for the Kentucky court system to deny such motions and dismiss the appeals of criminal defendants. The *only* control which this Court has left to the judiciary of Kentucky is to apply sanctions against attorneys who willfully refuse to follow the briefing schedules which the Kentucky Supreme Court is required by state law to impose and supervise.

Those lawyers who practice before the Supreme Court of the United States have little doubt as to how swift will be the punishment and how awesome will be the consequences for willful disobedience of the orders of this Court. The paucity of case law attests to the effectiveness of that certainty in controlling the processes of this Court. Even the President of the United States has shown obedience to the lawful orders of this Court rather than risking disobedience. *Nixon* v. *United States,* 418 U. S. 683 (1974). *This Court* would not tolerate for a moment the tactics which Petitioners have practiced before the Supreme Court of Kentucky. If this Court should deny to the Supreme Court of Kentucky the power to punish Petitioners for the contempt which they seem deliberately to have brought upon themselves, then *this Court* will be sending a message to the practicing members of the Kentucky Bar and every other state bar in the United States. That message will be that in the publicly funded defense of criminal defendants *there are no rules.* That message would be as applicable to federal

proceedings as to State proceedings, to trial proceedings as to appellate proceedings, and to private defense as to publicly funded defense; there would be no limit to the power which Petitioners and others like them would assert. There should be no mistake about it. This attack upon the contempt power of the Supreme Court of Kentucky is a major attack upon the integrity of the judicial process by Petitioners and others similarly situated who seek to bend the rules of the system to fit their own philosophical positions. Surely this Court cannot leave the Supreme Court of Kentucky in such position of helplessness against this attack; therefore, the Petition for Writ of Certiorari should be denied by the Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the Petition for Writ of Certiorari and let stand the decision of the Supreme Court of Kentucky holding Petitioners in contempt of that court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Robert Leathers, counsel of record for Respondent, hereby certify that forty (40) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543; that five copies were mailed to Hon. Robert C. Ewald and Hon. Michelle Turner, Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, Kentucky 40202; and that five copies were mailed to Hon. David L. Armstrong, Office of the Attorney General, State Capitol, Frankfort, Kentucky 40601; on this the 19th day of December, 1986, by my personally depositing same in a United States mailbox, first class postage prepaid. I further certify that all parties required to be served have been served.

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APPENDIX

SUPREME COURT OF KENTUCKY

June 24, 1986

Re: Parramore Lee Sanborn v. Commonwealth of Kentucky
Honorable J. Vincent Aprile, II
and Honorable Julie Namkin
Show Cause Hearing

Appearances:

Chief Justice Robert F. Stephens
Justice Roy N. Vance
Justice William M. Gant
Justice John D. White
Justice Charles M. Leibson
Justice Donald C. Wintersheimer
Justice James B. Stephenson

Robert E. McBeath
Court Administrator

Hon. Julie Namkin
Attorney at Law
P. O. Box 4043
Louisville, Kentucky 40204

Hon. J. Vincent Aprile, II
Attorney at Law
Assistant Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Pursuant to notice duly given, the above styled matter came on to be heard on Tuesday, June 24, 1986 at 11:00 A.M. at the Supreme Court, Courtroom, Second Floor, The Capitol, Frankfort, Kentucky.

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Chief Justice Stephens: This morning we will have a hearing on a Show Cause Order which was entered on August 30, 1985 in which the Counsel in the case of Parramore Lee Sanborn versus Commonwealth, Mr. Vincent Aprile and Ms. Julie Namkin were ordered to appear for contempt. The Order should be made part of the record in this case. The procedure we will use this morning, unless there are any valid objections, is that we will swear the two witnesses, who are parties, and then you may proceed to show us, if you can, indeed why you should not be punished for contempt. So, are both of you going to testify, Mr. Aprile, Ms. Namkin?

Mr. Aprile: I plan to.

Chief Justice Stephens: All right, raise your right hands, please.

Mr. J. Vincent Aprile and Ms. Julie Namkin
Administered Oath

Chief Justice Stephens: All right, who's going to go first? All right, Mr. Aprile.

Mr. Aprile: May it please the Court. Basically, I will not add very much to embellish what has been put forth in

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our particular pleadings in this case. As I'm sure the Court is aware, when we requested in this case the original 10 month extension, that was within 30 days—that was during the—after the initial 30 days in which we received the record. Obviously, we looked at the record. We had not been able to go to any great detail, and based on what was then our present case load, we estimated 10 months. The record involved in this case, according to my calculations and my attempts to verify it, is the longest record that has ever been before this Court in a recent death penalty case. I may be wrong about that, but as best I can verify

it, that is the situation. There are 13 volumes of record in this case, 1981 pages, and 56 volumes of the evidence, 8261 pages, and then there are additional pages in suppression hearings, depositions, guilty plea colloquy, things of that sort. The size of the record is very long. Originally, I was assigned this case when the record was beginning to be prepared, with Richard Arvadon. At that time, I believed that Richard Arvadon would still be in the office and be one of the two attorneys on the case. At the time that the record was to be prepared, it became obvious that I would also be counsel in a case that I had tried, Brian Keith Moore, and that

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I would, as I had been established, continue to represent Mr. Moore, along with Mr. Radigan in that death penalty appeal. And, when the time came for this record to be certified, it was very obvious that I was going to have to do two death penalty appeal briefs at that time. Additionally, Ms. Namkin was the attorney who was put on to replace Richard Arvadon with me, and she, at that time, that would have—this would have been her first death penalty appeal. We did not have anybody else available in the office, and this was going to be her first appeal. During the 10 month period, other cases have come forward, including, in my particular case, a case that was restored that another attorney had tried and done the appeal. It was restored by federal habeas order saying that this Court would reinstate it. This Court agreed to reinstate it. I was put under a show cause order in that particular case to finish that brief. Basically, what it comes down to is—I—at the time that we reached 10 months, I had not completed—I have a considerable portion of the record yet to read, and we are unable—

Justice Stephenson: Are you telling me that you had a 10 month extension and you haven't read the record yet?

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Mr. Aprile: Ms. Namkin has read the entire record. I have not read the entire record. That's correct. At the same time, I have to point out, I had another case that has 17—21 volumes that was briefed and done in this same time period, as well as I said, the other case. In all fairness, at least to me, in all fairness, my job is not simply in the office to be an appellate attorney, but when I was asked to take this case, I did it with full knowledge of what that would mean, and I'm not trying to shirk that responsibility. But, all of my job does not revolve around doing appeals. I am not a member of the appellate branch. I'm the general counsel for the office. I represent the office in other matters, and I have administrative duties as well, and I have to do and perform those things. We have a limited size staff to do these different things.

Justice Stephenson: Did you say Ms. Namkin had read the record?

Mr. Aprile: She has now. She did not read the record—

Justice Stephenson: You don't contend that both of you have to read it, do you?

Mr. Aprile:

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Yes, I feel I have to finish reading the record, but not to slow her up, Your Honor, while she can be working on some of the issues. No, I'm not saying that. But, I fully intend to read the record. That's not my point that I would say that only Ms. Namkin would read it. But she has finished it, and I don't want to put any words in her mouth, because she will testify, as I understand it, before you, but in any event, even had we been able to finish both of us reading the record within the 10 months, there is no way that I could see, looking back on this case, that we could have finished it within this time. I guess it is before the Court because it's part of this case, but the Attorney General's Office filed

an opposition to our extension motion and in it you will notice they have done a computer printout of the amount of time cases have taken in the briefing process. I take them at their word. I look over this, and I see, that for example, there are cases on here—the longest case before now, record size, was the Hollan and James case. It took 20 months. Our case is longer, record wise, than the Hollan and James case, and I think, from my reading of the decision in the Hollan and James case, contains equally comparable complex issues that need to be

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dealt with. In our particular case, our request for 10 months would put us at a total, with the initial one month briefing time, of 21 months. This is not out of line with the longer cases that this Court has granted extensions in. I would not want you to think that I am in here asking that we are entitled to 21 months because of simply the fact that you have given that amount of time in cases of comparable length. But I do think it supports our position in this particular situation that this is a very long and difficult case to manipulate, to be able to deal with all the different parts of it as we try to hone it down and make the arguments on behalf of this particular client. I don't think our request is out of line.

Justice Stephenson: You haven't completed the brief as yet or you haven't even finished reading the record?

Mr. Aprile: That's right. We have identified a number of issues that we are working on—

Justice Stephenson: You haven't even started on the brief?

Mr. Aprile: Yes. No. Well, the actual final product of the brief, Your Honor, no. That's why we asked for 10

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months. We had requested in this case another 10 month extension. As I—Julie and I both pointed out—Ms. Namkin

and I both pointed out in the original extension motion of 10 months, it was an estimate, and we said this may be revised upward or downward. At that point, we had only had the physical record for 30 days when we tried to make this estimate.

Justice Vance: Were you making an estimate of when you were going to get started writing it, or when you were going to have it completed?

Mr. Aprile: Your Honor, we were trying to make a reasonable estimate at that time with regard to that case, the size of the record, and what our present case load was. As I'm—

Justice Vance: Estimate of what? What was your estimate?

Mr. Aprile: Of trying to be able to finish the brief. Yes, we were not—I don't mean to mislead you in that regard. When we asked for 10 months, our estimate was, based at that point, what we knew, 10 months to complete the brief.

Justice Gant:

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The truth of the matter is and what you're really saying is that in the original 30 days you haven't got time to evaluate the record except for weighing it on the scales, because you've taken 10 months and haven't read it yet.

Mr. Aprile: Your Honor, I don't want—I agree with what you've just said.

Justice Gant: I'm not fussing at you. I'm just saying that with 17 volumes, there's no way in 30 days you can be any more accurate than a guess.

Mr. Aprile: The only thing I want to say, Your Honor, is I don't want—it's not fair to Ms. Namkin. You know, she has finished the record. In all honesty, she didn't finish it long before the 10 months were up, but she has

finished the record. So, I am the one who has not finished the record, but—

Justice Stephenson: Where is this idea that both of you have to read the record? If you have three lawyers, do you mean three would have to read it?

Mr. Aprile: That's normally our procedure, Your Honor.

Justice Vance:

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Why can't one do it?

Mr. Aprile: Well, basically, the feeling that we have—we have a number of reasons for that. First of all, it is normal procedure now across the country, in most states, the death penalty appeals are done by two people and they both read the record for the purpose that somebody does not miss a significant issue, since we are talking about a person's life. Obviously, there is no requirement that I can point to under the rules or under the constitution, but it's a safety check procedure. Ms. Namkin now has finished one death penalty case that she did during this 10 month period, the Askew case, but at least, initially, this was her first death penalty case, and that was part of our consideration. But, in every case, we try to have both attorneys read it for the simple reason that if I don't read the record and she misses something, there isn't a check on it.

Justice Stephenson: You don't — you have — do you have some —

Mr. Aprile: Knowledge of what the case is about, yes, Your Honor.

Justice Stephenson:

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—knowledge of the objections and matters that have been presented?

Mr. Aprile: Yes, Your Honor. And, I have researched certain issues. I have researched certain issues in this case, but I stand—

Justice Stephenson: Why—if you have the objections, that portion of the record usually is of manageable size regardless. Why don't you—

Mr. Aprile: We have identified 75—based on her reading and other things in the case, we have identified 75 issues that we are culling through, researching, cross checking, to see the prejudice and that sort of thing, whether or not they are to be raised. Obviously, we may not raise anywhere near that number of those issues, but we have to check each and every one of those out. That's the way we've done it in the past and we do that to protect the defendant. I know that the Court knows in these long, long cases that certainly we must provide some help to you by—in the briefing process—by giving you a way to manage that record, and that takes a considerable period of time. I know that this does not concern the objection that the

Attorney General has raised, but I would just point out that it is quite a different thing to do an appellee's brief where you look at 25 or 30 issues, even in the biggest case, you look at those 25 or 30 issues and look at where the appellant says those issues were preserved, where prejudice was in the transcript, and you don't have to read the record. It's a different story for us. We have to read the record. I understand your point, Your Honor, and it may very well —you're saying why do two have to read it? But, we definitely have to read the record. You would consider us remiss if we did not read the record before—

Justice Stephenson: I could see where both of you would have to read that portion where it's preserved, but

where it's not preserved, I don't see why two, or three or more would have to read it.

Mr. Aprile: Well, of course, when I say preserved, I'm not just talking about the motion and grounds for a new trial and that. We're talking about preserved at different places in the record as well—

Justice Stephenson: I'm talking about that too.

Mr. Aprile:

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—that were not identified in the motion and grounds for a new trial, plus it's our understanding, at least at this point, that to a certain extent there is more latitude in a death penalty case that it may be necessary for us to raise in certain instances unpreserved areas.

Justice Stephenson: Well, one person can handle that, can't they? Why not? You've always got 1142 on ineffective assistance of counsel.

Mr. Aprile: Probably ineffective assistance of appellate counsel, I'm afraid, but—

Justice Stephenson: Well, I don't know why—

Mr. Aprile: But—

Justice Stephenson: Let me ask one more question.

Mr. Aprile: Certainly, Your Honor.

Justice Stephenson: We get these enormous briefs in these death penalty cases. How much—what percentage of these briefs would you say is comprised of material that's in a word processor where you just change the names and

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punch the button?

Mr. Aprile: Well, in all honesty, in the cases that I've been involved in, Your Honor, nothing.

Justice Stephenson: Well, the reason I ask that question is, in death penalty cases, I see the same arguments, the same authorities, and just the names are changed.

Mr. Aprile: There are certainly some instances, and I can't speak for the other briefs—the briefs that I don't work on, I have nothing to do with in the sense that I am no longer head of the appellate section—

Justice Vance: I've had one where the name wasn't even changed. It was a case, but it used a name in some other case—

Mr. Aprile: Of another appellant?

Justice Vance: Yes.

Mr. Aprile: Well, then on behalf of the office, I definitely apologize to this court.

Justice Wintersheimer: We had another instance in which the offense was

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totally different.

Mr. Aprile: The offense was different?

Justice Wintersheimer: Yes.

Mr. Aprile: And, it was talked about in the brief as if that was the offense? Well, all I can tell you—I can't speak for the other attorneys in the office, and I don't mean to deprecate them at all, it seems to me it is my responsibility on the case that I am assigned to, to make sure that I raise the issues that are relevant and pertinent in that case. If they are things that this Court has definitely said you will not consider, for example, certain of the sentencing issues that you believe are not—that are not error under the federal constitution or otherwise, it may be necessary for me to raise that for preservation, for—to insure that I exhaust state remedies. In that case, I'm not saying that I wouldn't look at another person's brief, but as far as access on my word processor (what's in my word processor that I take access to, the cases that I have done and as a practical matter of our system, we expunge the briefs once they are finished. So, I don't steal from one place to

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another, but it isn't to state that I'm going to reinvent the wheel. If I have done what I think is a decent exhibition of argument from you, I will borrow from that in the interest of time.

Justice Leibson: Counsel, aside from these points that have been raised by others, I have another point I'd like to ask you to address that disturbs me, as a matter of good faith. You were granted—asked for and granted a 10 month extension with a proviso in it which was obviously put there so you would take it seriously, that if you didn't do it in 10 months you were going to have to come here and show cause why you hadn't done it. And, you filed this motion for an extension of time on the last day, the 2nd of June, the very day the 10 months ran, which certainly, as you can see, creates some issues about how much you've been looking at the file or paying attention to it before, when you come in on the very day that the time would run. And, of course, I'm sure you realize in any other case where you wouldn't have a problem of inadequate representation of counsel, you would have been refused. That would have been the end of it. There's no way that we would have entertained a request for an extension of time filed on the same

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day that the time would run. So, we have a problem. We have a duty to maintain the authority of the Court, and in the other hand, we have the duty to respect the rights of the defendant to be adequately represented, and we're concerned—at least I'm concerned and I can't speak for my colleagues—I'm concerned that we're losing control of running the courtroom to the lawyers. How can you justify, if you will, please sir, waiting until the 2nd of June and then coming in and telling us not that you need an

extension of time and we should give it to you, but that we have to give it to you. That's what it amounts to really in these kinds of cases. Either we have to or declare that —or if we refuse to, then we obviously open the case up to the charge of inadequate representation of counsel. So, how can you justify this—which we've had before, which is why we put in this show cause procedure, this practice that you indulge in here of waiting until the 10—the last day of the tenth month to file this motion?

Mr. Aprile: Your Honor, I think that in all fairness to Ms. Namkin, I should take total responsibility for that. She raised some concern about when we should file the extension request earlier than that,

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certainly not three or four months in advance, because we didn't know. We could see that there was definitely going to be problems, but I felt that the Court had already set up that there was going to be a show cause hearing, and we were going to have to appear, and I felt that the closer we got to the date, hopefully we would be better able to estimate and say what our progress had been. That certainly wasn't her fault. As the senior member of the two attorneys here, that was my decision, and if that is offensive to this Court, then it should be on my shoulders, not on her's, even though she signed the pleading; because I felt that this Court would hold the show cause hearing and expect us to come forward at that time. I did not think that you would not hold the hearing, so I felt we would go as close to it as we could and give you the best estimate. As it turned out, I don't know that it has helped all that much in the terms of amount of time, or that anything crystallized there, but that was my decision, and I felt that I would have to be here before you regardless of when we asked for it. Now, I may have been totally wrong, and totally misread the Court. In that case, I apologize, but it

was my understanding that we would have the hearing when

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I saw your order regardless of what reasons we gave,

Justice Wintersheimer: Well, Mr. Aprile, the 10 months wasn't easy to come by, you had no acquaintance with that, but I read the order to mean that we hoped that you would certainly have your brief at that time, and we wouldn't have to have this hearing.

Mr. Aprile: Oh, yes, Your Honor. Oh, please, don't misunderstand me. I know that. Had we had the brief in within that time, then there wouldn't have been a hearing.

Justice Wintersheimer: Right. You've come in occassionally, the Public Advocate generally, and most of the time we give you perhaps six months, 90 days, something like that. Frequently, in my view, that's unrealistic. Give you as much time as it appears you need and then expect the brief to be there. There's no point in having hearings and shuffling papers back and forth. We ought to set a realistic deadline. The problem I have is similar to what Justice Leibson has expressed, that early on, certainly experienced counsel, and you are that, should have been able to tell us, look, it's going to be longer

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than 10 months, and we made independent inquiry whether that was a reasonable time, and 10 months seemed to me to be reasonable, don't have you come back here at the end of six or anything like that, but have the brief here at the end of 10. But, I think what he said reflects my view, that somewhere along in there, you should have said, no, we have weighed this on a scale, or we've looked at the number of pages, and that's not realistic, and here's why. And, that's what bothers me about this situation.

Mr. Aprile: And, I understand what the Court is saying, and I can see the defect in the way that I approached

it. And I guess part—in all candor—I guess part of this perhaps come about, and maybe this isn't true for all the attorneys in the office because I can't speak for them, but part of it comes about from perhaps somewhat of a fear—maybe it's not a justified fear, maybe it's a paranoia—but, you know, this is not the only case, even for me, this is not the only case that I am doing. I have—when you request an extension, you run the risk in most instances that the counsel for the Attorney General in every case will come back and say this is unreasonable, why isn't it in, why isn't it done.

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You have to either respond to those or deal with those, and nobody considers that you may be under two or three show cause orders, or under a final in another court, because I understand, you're processing each of the cases individually and that's the way it should be.

Justice Stephenson: You know that—if you're under other show cause orders you know that when you're going to make an estimate of your time.

Mr. Aprile: But, Your Honor, when I made the estimate—for myself, not speaking for Ms. Namkin—but when I made, part of my estimate, as I said, in the motion was based on my case load, and after the motion was filed, the Johnson case was reinstated by this Court, as it should have been—I'm not complaining about that—I'm just saying how things you don't have any idea take place. The Johnson case came in. The Brian Keith Moore record was certified shortly after this, and I made the request in that case with Mr. Radigan. Then, another case was reinstated that had to be done, and in these situations, you've got to try to work to a certain extent on various ones of them, and you can't find time—at least I haven't been able to—to do all of

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them.

Justice Stephenson: Well now, you say that this death penalty case is so important that it requires two people to read the record, now if it's that important, it looks to me as though it's important enough to devote all of your time to it, and not the administrative duties. If you're going to undertake this, and if it is that important, then well, you've got 10 months here, with a 10,000 page record, that's a thousand pages a month. I just don't see how even a ten thousand page record, transcript, is not—you can go through that in pretty short order. Any experienced lawyer can start looking at the pages and tell whether there's anything on there of any significance or not.

Mr. Aprile: I would say this, Your Honor, in response to what you said. I have assigned job responsibilities in the office. They include more than doing appellate work. I am not trying to say that that justifies any special treatment of me, but I think it counts the same as the other appellate work that the appellate attorneys are doing, when we have a severe shortage of attorneys in many respects. I was required to consider whether or not to take

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this case, initially, and then again when Richard Arvadon left. The decision was made in conjunction with my supervisor and the need for an attorney to do this case. Similarly, when I had to take the death penalty case in Hopkinsville that's going on right now at the trial level, the decision was not part of my normal duties, but because we had a shortage and we couldn't find anybody to fill in, and the Christian County Circuit Judge is asking, we need to have somebody replace this person who has left your office. And, they came to me and asked me, and there's nobody else to do it, so what do you do?

Justice Stephenson: Members of your office now handle these cases at the trial level, is that correct?

Mr. Aprile: Sometimes. This case was not done that—this was done by other people in the local office in Oldham County, and a private attorney—but, yes, Your Honor, there are a number of cases where we try them as well, yes, sir.

Justice Stephenson: We see those, and it seems to take the same amount of time.

Justice Vance:

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It seems to me, from your argument here now, that if your office just lets itself get completely short of attorneys, then we would never be able to have an appeal in a case. If the justification is the shortage of help, then you're going to have to come down from three attorneys on a case to one on a case, because it just doesn't make any sense at all to say that we just are forever stymied, and that appeals must languish forever because you don't have enough people to have three or four people read the record in every case.

Mr. Aprile: Well, in all fairness—I understand the argument, Your Honor, and the point that you're making—but, in all fairness, it seems to me that the truth of the matter is that the briefs do get filed. They may take longer in some cases than in others. Most of the time it is a direct component of the length of the record, but it also can be a direct component of how many cases that particular attorney has to deal with, and that is part of our shortage situation. But, as a practical matter—I can't speak for the Court obviously—, but it would seem to me that you know that even though—and I appreciate the mistakes and the problems that you have pointed out in our death penalty briefs—but I

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think it would only be fair to say that the final product that you get in, in these cases, you have some appreciation for the amount of work that has gone into them,—

Justice Leibson: What we appreciate, in all honesty—this is a digression, but since you are counsel to your office—what we appreciate is we get four or five hundred pages of briefing, most of which isn't even remotely arguable, much of which isn't, instead of focusing in on the major points. Whereas, I would think that if you feel compelled to raise points that some judgment should be used as to what are major points and what are minor points. An error can be preserved for federal courts by just raising and passing on past the minor points that have been raised in numerous other cases, and, quite frankly, as far as I'm concerned, a five hundred page brief does your client a disservice. I see no way that I can possibly focus on the major points when I have to make the judgment about which are really the major points that need to be reviewed, instead of you. It seems to me that we have a collateral problem here of unlimited briefing for the same cause. Apparently, we are at the mercy of the lawyer, because otherwise we can have a collateral

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attack, we're building in a collateral attack about inadequate representation. But, the truth of the matter is, your client is suffering. Your client is being inadequately represented by these extremely lengthy briefs treating 75 issues as equally important. And, I raise this—it's not relevant to the inquiry we're having here, but it seems because of your position—because of the general subject of discussion, that it is something I wanted to get off my chest, and I do so with apologies to you and to my brethren whose time I have taken.

Mr. Aprile: I appreciate your comments, Your Honor, and I certainly understand what you're saying. It's very difficult, obviously, for me in this context, to respond either to some of the things that you have said. There always will be, I suspect, differences between the Bench and the Bar over how we protect our clients. And, certainly I am not trying to say that I have a monopoly on being right on this or anything like that. All I know is, I try to do the best that I can under the circumstances for each individual client, and I would say this, that I am well aware that the delays in a death penalty case are equally hard on the client. It's very

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difficult when you have to tell your—when I have to talk to the client and say, I've had to ask for more time in this particular situation, and try to explain why I'm doing it.

Justice Leibson: Maybe that's what we ought to require, that the appellant—that every time you ask for a delay that your client has to personally sign on the request so that they do know where the delays are coming from.

Mr. Aprile: They do know—Your Honor, I do—I understand what you're saying, but I want to make it very clear that we send them copies, talk to them before we file motions for extensions, and discuss it with them and explain it. Whether or not you want that requirement on a motion is one thing, but it's not like they think that this is something that the Court ordered. They know that we have requested it. We explain that.

Justice Leibson: Well, I'm glad to hear that.

Mr. Aprile: And, they are not always happy. I don't mean to mislead you, and that is a real problem. In all honesty, as I stand before you in this case, I also

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want to say this to you. When I was trying to talk a moment ago, perhaps the fear, or you may want to say that

it's paranoia because you know yourselves better than I do, right? And, maybe it's an unjustified fear. But, I'm not sure—and I asked around and everything when I tried to put together what I would ask in Parramore Sanborn, knowing the size of it and that, and I made a good faith estimate at 10 months in one way, but in a sense, I wasn't very sure that you would consider anything longer than that at the time. I felt it was bounded by what I thought we could do under the circumstances, and also that probably, you know, I've been doing this for 13 years—rightly or wrongly, I've been before this Court for 13 years now, and there was a time when the practice was totally different. You were not allowed—simply not allowed to ask for more than 30 days at a time. And, I'm not saying that I understand that to be the practice now, but I didn't know at what level of increments this Court would say, no, we just take it 10 months, nine months, seven months, at a time. I wasn't sure. So, I was balancing and dealing with Ms. Namkin and talking about it. I was also talking about what increments the Court would want to review this case in, and to review

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our progression. And, I wasn't sure that you would come back to us and say, when you granted the original order, grant it for seven months and come see us in seven months.

Justice Stephenson: Ten months is more than adequate for any case ever conceived by the imagination of man, if you get to it and get it finished.

Mr. Aprile: Your Honor, if that was the only case—

Justice Stephenson: I know that. But, that's the problem—that's why—

Mr. Aprile: But, it's a reality, isn't it?

Justice Stephenson: Beg your pardon?

Mr. Aprile: I mean, it's a reality, isn't it? I understand your rules say, or at least the warnings that are on

the documents say to us, the only thing that matters in these extension motions are the circumstances of the case. Now, I've come in here with one of the longest records that's ever been put before you, but as a reality, I know this, that it's also what do we have to do. If I could hang up on all the other clients that call me, if I

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could not respond—

Justice Stephenson: Here's the problem now. Ms. Namkin has finished it. You haven't. You say you both have to do it. Now, I think we're getting into a situation where we just can't—I don't think we can tolerate that. Where do we end up? You say the briefs are eventually in, and I agree. But, when? We get into a period of time that's unconscionable.

Mr. Aprile: Some of the briefs, Your Honor, are in very quickly for a death penalty case. And, some of them are in at this amount of time or longer. I had hoped that in this particular case, that, you know, it could be an individual determination, looking at the circumstances of this case. But I also know, as a practical matter, I—

Justice Stephenson: Well, aren't you all going to have to change your procedure here, just let one lawyer read the briefs—read the transcript, I mean? If these—

Justice Vance: If you can't meet deadlines.

Justice Stephenson: If these delays are stretching out longer and longer and longer, somewhere there has to be an end

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to it.

Mr. Aprile: Well, perhaps I'm the only one to blame in this. I mean in this particular situation. I don't know what happens in other cases. I don't know if the parallel is that both people have read the record at the same time or

not, and so I'm not coming in here trying to talk about anybody else's case or any other situation. That may not be a problem in any of the other extension requests. But, Ms. Namkin has read the record in this case, totally, and I haven't. So, that is a problem in this case.

Justice Wintersheimer: Let me interrupt you for a minute. Is this an office policy, that both of you read the record?

Mr. Aprile: It's an office policy that two people be on death penalty cases, and we take that to mean that they are equal counsel. They are equal counsel. They are responsible—

Justice Vance: And, both of them have to read the record before one of them starts writing anything.

Mr. Aprile: No, sir. No, sir. No, sir, that's not true. In fact, I have started putting some things together

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in this case on issues that I know about in there, when I haven't even finished the whole record, and in a way, that can be a help sometimes, because as I put law aside on that particular issue as I am reading, I can be building on a particular argument. There's no doubt about that. And, I have not said to Ms. Namkin, you can't go forward until I have read the record. That's not what we're saying at all.

Justice Stephenson: Do you both write a brief?

Mr. Aprile: Do we both write the brief? Yes, Your Honor.

Justice Stephenson: Well, do you collaborate on it, or do each one of you write a separate brief?

Mr. Aprile: Different—in my experience, it's been done different on certain issues. We may take issues that she's dealt with before, and she might write it by herself. We've discussed this. We've never done one jointly. We might write—Mr. McNally and I have, in the past, written issues

together, and then merged them, and put them together, and one of us has responsibility that way. It varies from situation, and case to case. But, no, we're not

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saying that we have to write each issue together, or that I would write every issue and she would look over my shoulder, or vice versa.

Justice Stephenson: How would it expedite these matters if just one lawyer read the record, and one lawyer wrote the brief?

Mr. Aprile: Well, in all honesty, Your Honor, I think that would cause a real problem in our office. And, the reason it would cause a problem in our office is,—I don't know if you appreciate this from our point of view or not—we don't relish the responsibility. I am here before you 13 years as being a public defender. I didn't like it when the death penalty came down, because it increases, I think, severely on my shoulders, personal responsibility. I am not responsible for the sentence that the man received, but I may be responsible for the type of appeal that he has. I don't think that we could keep very many lawyers very long if they were told, one attorney—this Court said—one attorney reads the—

Justice Stephenson: We're not going to say—I don't think this Court is going to say that. I'm just saying that it's pretty difficult for me to accept the excuse that

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two of you have to do it with these long, interminable delays.

Mr. Aprile: Well, again, I am taking the responsibility for this particular delay.

Justice Stephenson: I know lots of lawyers, that if you try a criminal case, one lawyer tries it, death penalty or otherwise. I don't see—

Mr. Aprile: I didn't mean—I certainly didn't mean to offend the Court a minute ago when I said about if this Court ordered it. I think the same reaction would occur if as a policy in our office it was said, one attorney reads the record in a death penalty case.

Justice Vance: Let me ask you this. There was an order here that the brief would be finished on a certain date, and if it wasn't there would be a show cause why there should not be some sanctions imposed. Not only was the brief not finished, but you haven't even read the record to get started on the brief—

Mr. Aprile: Haven't read all of the record, that's right.

Justice Vance: Now, do you consider that a fairly cavalier

treatment of this Court's order that when you're ordered to finish something in 10 months and at the end of 10 months you haven't even read the record?

Mr. Aprile: I feel this way, Your Honor—

Justice Vance: Did you just think that there would be nothing done about it?

Mr. Aprile: No, no, Your Honor. I didn't feel—I didn't feel, for example, when you put me under the show cause order, knowing that I was under the other one, when you put me under the show cause order in Johnson, that I was being cavalier in having to elect between which of those two I did. I finished one show cause order. Ms. Namkin was under two. One in Askew, and one in this. She finished another. It seems very difficult, you know, for me to look here and say, that what the Court is saying is we put you under a show cause order, devote all your time to that case, and turn around and you say, you're under a show cause order here, and you have—and another court is saying you have to be in my court or you'll be held in contempt of court. Down there in Hopkinsville, you've got

to provide this representation. I mean, really and truthfully,

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it's like a rubberband being stretched in all different places. If it appears cavalier to you, Your Honor, I would apologize for that, but I would have to say, it's balancing a lot of requirements of courts. And, I know that you are the Supreme Court, and what you say is the most significant. But, even in that situation, you have put both of us, during this same 10 month period, under show cause orders and asked us to comply, and we have tried. And, it seemed easier to comply, in my case, with Johnson, than it did with this particular case. And, I'm sure the Askew record is much shorter than this particular record. And, I'm under oath here, and I'm saying to you that you're right factually. I have come in here, unlike Ms. Namkin, and I have not read all of this record, and I am considerably behind in that regard. But, I have done other things in the case that I hope will expedite finishing it. The other thing I say to you is, in asking for 10 months, just as we asked for 10 the first time not knowing exactly what would happen, not being able to predict, that hopefully, we'll finish it before 10 months. I can't say that that actually would happen. That that actually can happen, in view of the other particular things we have to do with regard to

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the other cases. We—well—perhaps I have spoken too long, Your Honor.

Chief Justice Stephens: Are there any more questions? All right, Mr. Aprile.

Mr. Aprile: Thank you, Your Honors.

Ms. Namkin: May it please the Court. Aside from the pleading that I have filed in this case explaining everything that I've done since I was assigned to this case, I'm

really not sure what else I can add. I'll be glad to answer any questions from this Court. I believe that I have conscientiously and diligently been working in this case, along with every other case that I have in the office. Just one point I would like to say. The fact of only having one person read the record, from my personal opinion, if that means anything, I just don't think that that is manageable at all. I mean, I just can't see—perhaps on a shorter case where there's not that many issues, where things are not as complex, where it's not a death penalty case, maybe you could have one person read the record and pick out every issue and tell the other attorney on the case, well, I've lifted x-number of issues, you do

a, b, and c, and I'll do d, e, and f.

Justice Stephenson: Why not one lawyer do the whole thing? I can't—I mean, I can't—do you think you're competent to read a record, recognize the issues, and write a brief about them?

Ms. Namkin: Yes, I do, Your Honor.

Justice Stephenson: Then why can't you do it by yourself?

Ms. Namkin: Well, I could do it by myself, but I certainly couldn't do it in 10 months with all the other case load that I have.

Justice Stephenson: Well, I know, but the point I'm making is, if you could do it by yourself, then you wouldn't have two lawyers occupied with it, and it would maybe decrease your case load a little bit.

Ms. Namkin: Well, whether I could do it by myself, and whether it would be a wise decision for me to do it by myself are two different questions, and I'm not sure that I think it's a wise decision for one person to take on this type of responsibility by himself or herself.

Justice Leibson: Can I ask a question I'm not clear on? Has any portion of the brief yet been committed to writing in a form that could—even as a first draft—in a form that could be read?

Ms. Namkin: No, it hasn't, Your Honor.

Chief Justice Stephens: Anything else? Any other questions from the Court? We have another—we're running a little late. Why don't we take a five or six minute break.

RECESS

STATE OF KENTUCKY
COUNTY OF FRANKLIN } SCT.

I, Juanita M. Toole, a Notary Public in and for the state and county aforesaid, do hereby certify that the foregoing testimony was transcribed under my direction; that the witnesses were duly sworn before giving their testimony; that the foregoing pages of typewritten matter constitute a true and correct copy of all testimony transcribed under my supervision.

I certify that the appearances are as listed on the first page of this transcript.

Witness my hand and notarial seal this 12th day of December, 1986.

(s) Juanita M. Toole
Notary Public
State of Kentucky at Large

My commission expires: February 17, 1990

SUPREME COURT OF KENTUCKY

File No. 84-SC-566-I

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION FOR EXTENSION OF TIME TO PERFECT APPEAL AND FILE BRIEF FOR APPELLANT— Filed June 2, 1986

Comes now appellant, Parramore Lee Sanborn, by counsel, pursuant to CR 6.02 and CR 76.40(1), and respectfully requests an extension of ten (10) months, from August 2, 1985 to and including Monday, June 2, 1986, in which to perfect this appeal and file the brief for appellant in the above-captioned case. The reasons for the requested action are delineated below.

1. Appellant was convicted of one count of murder (KRS 507.020), one count of kidnapping (KRS 509.040), one count of first degree rape (KRS 510.040), and one count of first degree sodomy (KRS 510.070). For the murder offense, appellant was sentenced to death.

2. The initial judgments in appellant's case were entered in the Henry Circuit Court on March 11, 1984. The initial final judgments entered on March 11, 1984 sentenced appellant to three (3) separate life sentences for the offenses of kidnapping, first degree rape, and first degree sodomy (Transcript of Record, Volume 12, hereinafter designated T.R. (12), pp. 1822-1823, 1825-1826, 1828-1829). A timely notice of appeal was filed on March 16, 1984 (T.R. (12), pp. 1880-1881).

3. A second judgment in appellant's case was entered in the Henry Circuit Court on March 16, 1984. The second judgment sentenced appellant to death for the offense of murder (T.R. (12), pp. 1868-1872). A timely notice of appeal from that judgment was filed on March 20, 1984 (T.R. (12), pp. 1884-1885).

4. A final order in appellant's case was entered in the Henry Circuit Court on June 20, 1984 overruling appellant's motion for a new trial and motion for a judgment notwithstanding the verdict (T.R. (12), pp. 1938-1939). A timely notice of appeal from that order was filed on June 27, 1984 (T.R. (12), pp. 1940-1941).

5. Copies of the judgments, order and notices of appeal are attached.

6. Pursuant to KRS 532.075(1), appellant's sentence of death is subject to mandatory review by the Court.

7. On May 30, 1985, the record on appeal was completed and certified.

8. Pursuant to an order of this Court, entered July 3, 1985, the brief for appellant is due to be filed on or before August 2, 1985.

9. The transcript of record consists of thirteen (13) volumes and 1,981 pages. The transcript af evidence consists of fifty-six (56) volumes with exhibits attached to twonty (20) volumes and 8,261 pages. In addition, there is a transcript of evidence of the grand jury proceedings consisting of ninety-seven (97) pages; one deposition for defendant consisting of fifty-nine (59) pages; one transcript of suppression hearing, in part, consisting of 126 pages; one transcript of a guilty plea colloquy consisting of seventeen pages; and one transcript of hearing consisting of sixty-two (62) pages, for a total of 361 pages.

10. The undersigned counsel have examined the record during the initial thirty-day briefing period and, based on their present caseloads and past experience with appeals

of comparable nature and size, estimate that an additional ten (10) months will be needed to read the appellate record, to research the issues, to draft the brief for appellant, and to have it typed and reproduced. Of course, it is possible that, after additional work on this appeal, this estimate may be revised either upward or downward. Because this is a capital case in which the death sentence was imposed, the undersigned counsel believe this initial extension request of ten (10) months is both reasonable and necessary under the circumstances.

11. During the last thirty days, undersigned counsel Julie Namkin has filed two briefs and one reply brief in the Kentucky Court of Appeals, and has filed one petition for modification or extension and has tendered one motion for discretionary review in this Court. In addition, counsel has had one oral argument in the Kentucky Court of Appeals.

12. Undersigned counsel J. Vincent Aprile, II, during the last thirty days, has filed a petition for rehearing and other pleadings in the Kentucky Court of Appeals as well as pleadings in both this Court and the United States Court of Appeals for the Sixth Circuit. As General Counsel for the Department of Public Advocacy, undersigned counsel Aprile is required to spend a considerable amount of his work time on *unanticipated* requests for legal and ethical opinions generated by both local trial level public advocates as well as members of the central staff of the Department of Public Advocacy. Additionally, undersigned counsel Aprile in his role as General Counsel to the Department of Public Advocacy has sole responsibility for representing the Department in litigation.

13. As employees of the Department of Public Advocacy, the undersigned counsel's control over case assignments and other assignments is minimal.

14. As Assistant Public Advocates in the Department of Public Advocacy, the undersigned counsel are compelled to commit a considerable quantity of time to numerous other clients, whose cases are also being procedurally and substantively processed within deadlines, and who are equally entitled to effective and timely representation.

15. This motion for an extension of ten (10) months is made in good faith and not for reasons of delay. The requested extension is sought only to insure that appellant will be afforded effective assistance of counsel on appeal.

16. It should be noted that appellant is presently incarcerated at Eddyville and is not free on bond pending appeal.

WHEREFORE this Court should grant this motion and order, pursuant to CR 6.02 and CR 76.40(1), that the appellant be granted an extension of ten (10) months to and including Monday, June 2, 1986, in which to perfect the appeal and file the brief for appellant in the above-captioned case.

Respectfully submitted,

(s) J. Vincent Aprile II
J. Vincent Aprile, II
Assistant Public Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601

(s) J. Vincent Aprile II
for Julie Namkin
Assistant Public Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601
Counsel for Appellant

NOTICE

Please take notice that the foregoing motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on the 2nd day of August, 1985.

(s) J. Vincent Aprile, II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been hand delivered to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 2nd day of August, 1985.

(s) J. Vincent Aprile, II

SUPREME COURT OF KENTUCKY

84-SC-566-I

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal From Henry Circuit Court
Honorable Dennis A. Fritz, Judge
83-CR-057

ORDER

Appellant's motion for an extension of time, to and including June 2, 1986, in which to file his brief and to perfect the appeal in the above-styled action is granted. If appellant's brief is not filed and his appeal is not perfected on or before June 2, 1986, appellant's counsel, Honorable J. Vincent Aprile, II, and Honorable Julie Namkin, shall appear before this court on June 24, 1986, at 11:00 a.m., in order to show cause why they should not be held in contempt of this court or sanctioned for failure to timely complete the brief.

Stephens, C.J., and Gant, Stephenson, Vance and Wintersheimer, JJ., sitting. All concur.

ENTERED August 30, 1985.

(s) Robert F. Stephens
Chief Justice

SUPREME COURT OF KENTUCKY

File No. 84-SC-566-I

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

MOTION FOR EXTENSION OF TIME TO PERFECT APPEAL AND FILE BRIEF FOR APPELLANT— Filed August 2, 1985

Comes now appellant, Parramore Lee Sanborn, by counsel, pursuant to CR 6.02 and CR 76.40(1), and respectfully requests an extension of ten (10) months, from Monday, June 2, 1986, to and including Thursday, April 2, 1987, in which to perfect this appeal and file the brief for appellant in the above-captioned case. The reasons for the requested action are delineated below.

1. Appellant was convicted of one count of murder (KRS 507.020), one count of kidnapping (KRS 509.040), one count of first degree rape (KRS 510.040), and one count of first degree sodomy (KRS 510.070). For the murder offense, appellant was sentenced to death.

2. Pursuant to an order of this Court, entered July 3, 1985, the brief for appellant was due to be filed on or before August 2, 1985.

3. On August 2, 1985, the undersigned counsel moved this Court for an initial extension of ten months from August 2, 1985 to and including June 2, 1986, in which to perfect this appeal and file the brief for appellant in the above-captioned case. Based on their examination of the record during the initial thirty-day briefing period, the

undersigned counsel "*estimate*[*d*] an additional ten months [would] be needed to read the appellate record, to research the issues, to draft the brief for appellant, and to have it typed and reproduced" (Extension Motion, p. 3; emphasis added). The undersigned counsel qualified that estimate in their extension motion. "Of course, it is possible that, after additional work on this appeal, this estimate may be revised either upward or downward" (Extension Motion, p. 3).

4. On August 30, 1985, this Court entered an order granting appellant's motion for an extension of time, to and including June 2, 1986, in which to file his brief and to perfect the appeal (Order, 8-30-85). The order added that "[i]f appellant's brief is not filed and his appeal is not perfected on or before June 2, 1986, appellant's counsel, Honorable J. Vincent Aprile II, and Honorable Julie Namkin, shall appear before this court on June 24, 1986, at 11:00 a.m., in order to show cause why they should not be held in contempt of court or sanctioned for failure to timely complete the brief" (Order, 8-30-85).

5. The transcript of record consists of thirteen (13) volumes and 1,981 pages. The transcript of evidence consists of fifty-six (56) volumes with exhibits attached to twenty (20) volumes and 8,261 pages. In addition, there is a transcript of evidence of the grand jury proceedings consisting of ninety-seven (97) pages; one deposition for defendant consisting of fifty-nine (59) pages; one transcript of suppression hearing, in part, consisting of 126 pages; one transcript of a guilty plea colloquy consisting of seventeen (17) pages; and one transcript of hearing consisting of sixty-two (62) pages, for a total of 361 pages. The total page count for the appellate record in the case at bar is 10,603 pages.

6. The request by the undersigned counsel for an extension of another ten (10) months is primarily based upon

the unusual length of the appellate record and the number of issues presented. The record has been read and counsel have identified in excess of seventy-five (75) *preserved* errors. Additionally, appellate counsel in death penalty cases have an obligation to raise in an appellant's brief unpreserved arguably meritorious issues.

7. According to the information available to the undersigned counsel, the appellate record in the case at bar is the lengthiest record on appeal in a death penalty case ever handled by the Department of Public Advocacy and probably the lengthiest death penalty case ever reviewed by this Court.

8. Due to the unusual length of the appellate record at bar, the large number of preserved errors to be evaluated, and the imposition of the sentence of death, the undersigned counsel believe this additional extension request of ten (10) months is both reasonable and necessary. The United States Supreme Court has acknowledged that "delays . . . in the course of appellate proceedings" may be justified by "the need to assure careful review of an unusually complex case." *Harrison* v. *United States,* 392 U. S. 219, 88 S. Ct. 2008, 2009 n. 4, 20 L. Ed. 1047 (1968).

9. Even if the undersigned counsel had been able to devote all of their time during the last ten months to the completion of appellant's brief, it would have been extremely difficult, if possible at all, to complete the brief within the granted extension period. But as the undersigned counsel informed this Court in their initial extension motion, as Assistant Public Advocates they both are required to represent other clients in the criminal justice system.

10. For example, in addition to undersigned counsel Namkin's regular appellate caseload, she was assigned another death penalty appeal (Robert Lee Askew) subsequent to filing the original extension motion in the above-

captioned case. Counsel Namkin will be filing the appellate brief in *Askew* v. *Commonwealth,* No. 85-SC-251-I on June 15, 1986. On May 14, 1986, this Court placed undersigned counsel Namkin and her appellate co-counsel under a show cause order in the event Askew's brief for appellant was not filed by June 15, 1986.

11. On September 3, 1985, approximately one month after the undersigned counsel filed appellant's initial extension motion, the record on appeal in *Charles Edward Johnson* v. *Commonwealth,* No. SC-292-MR, was received by the Clerk of this Court. Undersigned counsel Aprile on January 30, 1986 was placed under a show cause order if he failed to file the brief for the appellant in that case by March 2, 1986. Undersigned counsel complied with that order and filed the brief in *Johnson* on March 3, 1986.

12. Additionally, in early April of this year undersigned counsel Aprile was required to substitute as trial counsel in a death penalty case which is pending trial in Christian Circuit Court. Substitution of counsel was necessitated by the resignation of the defendant's initial counsel from his position with the Department of Public Advocacy to join the staff of a Kentucky state prosecutor's office. Undersigned counsel Aprile's involvement in that case has absorbed a large portion of his time in the last two months. Of course, that assignment was not known to undersigned counsel Aprile in August, 1985.

13. As employees of the Department of Public Advocacy, the undersigned counsel's control over case assignments and other assignments is minimal.

14. As Assistant Public Advocates in the Department of Public Advocacy, the undersigned counsel are compelled to commit a considered quantity of time to numerous other clients, whose cases are also being procedurally and substantively processed within deadlines, and who are equally entitled to effective and timely representation.

15. This motion for an extension of ten (10) months is made in good faith and not for reasons of delay. The requested extension is sought only to insure that appellant will be afforded effective assistance of counsel on appeal.

16. It should be noted that appellant is presently incarcerated at Eddyville and is not free on bond pending appeal.

WHEREFORE this Court should grant this motion and order, pursuant to CR 6.02 and CR 76.40(1), that the appellant be granted an extension of ten (10) months to and including Thursday, April 2, 1987, in which to perfect the appeal and file the brief for appellant in the above-captioned case.

Respectfully submitted,

(s) J. Vincent Aprile, II
J. Vincent Aprile, II
Assistant Public Advocate
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601

(s) Julie Namkin
Julie Namkin
Department of Public Advocacy
151 Elkhorn Court
Frankfort, Kentucky 40601

NOTICE

Please take notice that the foregoing motion will be filed in the Office of the Clerk of the Supreme Court of Kentucky on the 2nd day of June, 1986.

(s) J. Vincent Aprile, II

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been hand delivered to Hon. David L. Armstrong, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601, this 2nd day of June, 1986.

(s) J. Vincent Aprile, II

TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

84-SC-566-I

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henry Circuit Court
No. 83-CR-057
Honorable Dennis A. Fritz, Judge

OPINION AND ORDER

On August 30, 1985, this Court entered an order in the above-styled action granting appellant's motion for an extension of time to June 2, 1986, in which to file his brief and perfect the appeal.

In the same Order we further provided:

> "If appellant's brief is not filed and his appeal is not perfected on or before June 2, 1986, appellant's counsel, Honorable J. Vincent Aprile, II, and Honorable Julie Namkin, shall appear before this Court on June 24, 1986, at 11:00 a.m., in order to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief."

Appellant's counsel, J. Vincent Aprile, II and Julie Namkin, failed to comply with this Order and a hearing was held on June 24, 1986, at which time Mr. Aprile and Ms. Namkin appeared and offered explanation.

We find the following facts to be true:

The transcript of evidence was filed on June 27, 1985. Thereafter, *on the day the brief was due* appellant failed to file his brief but instead filed a motion for a ten (10) month extension. The reasons for the requested lengthy extension included a recitation of the length of the record on appeal and counsels' present caseloads, along with counsel's estimate, after reviewing the record and based on their present caseloads and past experience with appeals of comparable nature and size, that an additional ten (10) months would be needed to prepare appellant's brief. In paragraph ten of the motion for extension counsel stated that "(b)ecause this is a capital case in which the death sentence was imposed, the undersigned counsel believe this initial extension of ten (10) months is both reasonable and necessary under the circumstances." On August 30, 1985, this Court considered and granted appellant's requested motion for extension of time and entered the aforementioned order.

Ten months later, *on the date the brief was due,* appellant failed to file his brief but instead filed a motion requesting another ten (10) month extension of time. Counsel failed to comply with this Court's order of August 30, 1985, to timely file appellant's brief and instead filed a second motion for extension of time which parroted in large part the language of the previous motion for extension of time and listed "the unusual length of the record, the large number of preserved errors to be evaluated and the imposition of the sentence of death" as reasons justifying counsel's request for an additional extension of time.

Counsel Namkin filed an ex parte motion to be relieved from appearing at the June 24, 1986 show cause hearing in which she detailed her current caseload. The Court denied the motion on June 23, 1986.

At the oral hearing conducted June 24, 1986, Mr. Aprile advised this Court that he had not completed reading the record in this case, nor begun writing the brief and that the initial request for an extension of time was merely an estimate of the time needed to complete the brief. Ms. Namkin advised the Court that, unlike Counsel Aprile, she had read the record but that she too had not begun writing appellant's brief. After ten-months' extension of time and in spite of a pending show cause order, neither attorney had begun writing appellant's brief, and one had completed reading the record.

Among this Court's responsibilities is the duty to protect the authority of the judiciary and to respect the rights of defendants charged with committing crimes. This Court may not dismiss an appeal for counsel's failure to timely file a statement of appeal and brief. However, this Court cannot tolerate interminable delays occasioned by counsel deciding when it is timely and appropriate for a brief to be filed, rather than following the dictates of this Court.

Mr. Aprile and Ms. Namkin gave no adequate repsonse to the Order of this Court to show cause. After eleven months neither counsel has committed any portion of the appellant's brief to writing and Mr. Aprile has failed to read the record in its entirety. Although counsel were fully aware that they would be unable to comply with this Court's order of August 30, 1985 and timely file appellant's brief, they waited until the last day of the tenth-month extension period to request another extension. Mr. Aprile advised the Court that Ms. Namkin had proposed filing the motion for extension at an earlier date, but that as senior counsel he elected to file the motion on the date the brief was due to be filed. Counsel were granted a realistic deadline for filing appellant's brief and could not justify the practice prevalent in criminal cases of routinely seeking an additional extension of time on the last day of the

extension period rather than filing the brief. When counsel is granted a lengthy extension of time in which to file a brief and it becomes impossible for counsel to file that brief, counsel shall inform this Court and request an additional extension at the earliest practicable date, justifying their inability to file the brief and the necessity for an additional extension of time to complete the brief.

We find no acceptable excuse for counsels' failure to even begin writing appellant's brief before the date the brief was ordered to be filed. We further find that Mr. Aprile and Ms. Namkin are in contempt of the Order of this Court entered August 30, 1985, requiring them to file appellant's brief on or before June 2, 1986, or appear to show cause why they should not be held in contempt of this Court or sanctioned for failure to timely complete the brief. We find counsels' explanations as to caseload to be inadequate to explain their lack of effort to commit any portion of appellants' brief to writing. We find no merit in counsels' argument that both attorneys must read the record on appeal in its entirety before beginning work on appellant's brief. We find no explanation for failing to notify us immediately if there were considerations that would legitimately have prevented their compliance with our Order of August 30, 1985, when notified thereof.

Being duly advised, it is the order of this Court that said J. Vincent Aprile, II, as senior counsel of record, is found in contempt of court and fined $500 for his contempt. It is further the order of this Court that said Julie Namkin, as junior counsel of record, is found in contempt of court and fined $250 for her contempt.

In consideration of this being the first conviction, payment of both fines is suspended subject to further conduct. Costs of this proceeding are assessed against Mr. Aprile and Ms. Namkin.

All sitting.

Stephens, C.J., and Leibson, Stephenson, Vance, and Wintersheimer, J.J., concurring.

Gant, J., dissents in a separate dissenting opinion and is joined by White, J.

ENTERED August 7, 1986.

(s) Robert F. Stephens
Chief Justice

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SUPREME COURT OF KENTUCKY

84-SC-566-I

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henry Circuit Court
83-CR-057
Honorable Dennis A. Fritz, Judge

MOTION FOR RECONSIDERATION—Filed Aug. 18, 1986

This Motion for Reconsideration of this Court's Opinion and Order entered August 7, 1986, is filed by J. Vincent Aprile, II, and Julie Namkin, pursuant to CR 76.38. In its Opinion and Order the Court found the Movants in contempt of court for failure to show cause why their brief in this action was not timely filed pursuant to the Court's earlier Order.

As we understand the Opinion and Order, the Court found these Public Advocate attorneys guilty of criminal contempt, which is defined as an act in disrespect of the court or its process which obstructs the administration of justice. *Casteel* v. *Sparks*, Ky., 226 S. W. 2d 533 (1950). The standard to be applied in determining whether an attorney is in contempt is to determine whether he or she is in reckless or willful disregard of the court's order. *United States* v. *Delahanty*, 488 F. 2d 396 (6th Cir. 1973). The facts of this case do not suggest that these Public Advocates were in reckless or willful disregard of the court's

earlier order. The Court may properly be unset with the delays which took place in this case, but contempt of court is not the appropriate way to deal with these problems. The impact upon the professional standing of a lawyer created by a citation for contempt of court is not limited to the monetary amount of the fine imposed. The court should take great care before imposing that method of discipline. *Miller* v. *Stephenson*, Ky., 374 S. W. 2d 372 (1971).

This Motion is filed for the purpose of seeking the Court's reconsideration of its finding of contempt as a solution for a problem which is neither the fault of these two individuals nor is likely to be solved so long as the staffing of the Department remains at its present levels. We also urge that, in seeking to express its message regarding delays and the methods of seeking additional time for filing of briefs, the Court has unfairly singled out these two individuals.

The Court relies on several factors in finding the Movants guilty of criminal contempt and presumably the intentionally contemptuous acts which are necessarily involved in that offense. First, the Court acknowledges that the Movants asked for an "initial" extension of time of ten (10) months, making it clear from their motion that more time might be requested. The Court suggests in its Opinion that ten months is an unreasonable length of time to prepare a brief in a death penalty appeal. Yet the information filed with the court by the Attorney General indicates that the average time for filing a death penalty brief is 12.4 months. So even a 10 month period of time is below average. In seven of 22 cases, the appellant's brief has taken 15 months or more. Movants are hardly deviating from the norm in seeking more than 10 months to prepare and file this brief. Certainly this conduct cannot be deemed contemptuous. It is unfair to single out these

two individuals for contempt on this point when these sort of delays have become almost routine.

Next the court chastises the Movants for waiting until the last day before filing their second request for extension, yet the court recognizes that the practice of waiting until the last day to file for an extension is a "practice prevalent in criminal cases." How can conduct be contemptuous when the established practice, which has at least been tolerated by the Court, is followed? For the Court to hold the Movants in contempt for following an established practice without prior warning that such practice will not be tolerated is a denial of basic fairness. Considering that this is a criminal contempt, such a conviction constitutes a denial of Due Process of law and of Equal Protection under the Kentucky and United States Constitutions.

The Court cites as the third reason for its finding of contempt the inadequacy of the explanation given by counsel regarding case load. The facts are simply that the Commonwealth has not budgeted adequate funds to the Department of Public Advocacy. With the reinstitution of the death penalty the burden has significantly increased. As the Affidavit of Movant Namkin points out, even though she is willing to work many hours of overtime, the Commonwealth is not willing to pay her for overtime beyond certain set amounts. Justice Gant is surely correct in characterizing these young Public Advocates as "dedicated." But they are surely frustrated too, for this Court criticizes them and finds their conduct criminal for failing to perform on time all that is assigned to them, when at the same time their employer refuses to pay them adequately for their overtime work when they try to keep up.

Movant Namkin has explained that she is assigned two case appeals each month to handle. Obviously, she cannot prepare a death penalty brief in the 80 hours of work avail-

able in a two week period. Reading the transcript in this case took many more hours than 80. The Court's criticism of Movants is upsetting, especially considering that the Court does not mention the unusual length of the transcript in this case, some 10,000 pages. Movant Aprile is not even assigned to the appellate section of the Department of Public Advocacy. Preparing appeal briefs is in addition to his regular duties, but he accepts this work because of the overload to the staff generally. For this same reason, Movant Aprile accepts assignments of circuit court death penalty trials when the staff members who ordinarily handle those matters are overloaded. Taking on these extra assignments does not constitute contemptuous behavior on the part of a Public Advocate. How can the delays which result be contemptuous? The hard work and unpaid overtime necessary to fulfill these commitments constitute an enormous service to the Court of Justice. It is simply unfair to the Movants to find them guilty of criminal contempt under these circumstances.

The Opinion and Order is critical because the writing of the brief for which an extension of time was sought has not yet begun, but the writing is the last step in the preparation of the brief. First, the 10,000 page record must be carefully read, the issues identified and researched, and only then does the writing begin. The fact that the actual writing of the brief has not yet begun does not demonstrate criminally contemptuous conduct.

The Court is critical that the Movants failed to notify the Court immediately when the need for additional time became apparent, but no previous Order of this Court has ever suggested such a practice is necessary. Established practice suggests otherwise. Following established practice cannot be categorized as contemptuous conduct. To impose a criminal sanction for violation of a rule which did

not exist at the time the act was performed is a violation of Due Process and is an *ex post facto law.*

If this court perceives a problem in the length of time in filing death penalty briefs which needs to be addressed, contempt findings in this case will not solve that problem. The time of delay involved here is not at all unusual, as the statistics demonstrate. The conduct of the Movants in taking the usual amount of time certainly does not indicate contemptuous conduct. Other, less severe sanctions are certainly available if the Court finds the delay to be the result of a lack of diligence. Only if lack of diligence becomes so extreme as to constitute disrespect does it rise to contempt. However, there is no suggestion that the Movants lack diligence generally in the performance of their many duties, only that they have put other important matters ahead of this brief.

Because of their overload the Movants are forced to make daily decisions with regard to priorities. If Movant Namkin has three ordinary briefs and one extraordinary death penalty brief due, she is faced with a decision regarding the allocation of time. If she determines to file the three ordinary briefs on time and seek an extension in the extraordinary case, she is not acting in a contemptuous fashion. This Court has made no finding of lack of due diligence on the part of the Movants in performing their duties generally. It is certainly true that if the Movants were to work on their briefs to this Court and abandon their other duties, the brief involved would have been long ago filed. Unfortunately, something else would be late and the problem unchanged. Indeed, the Court may be critical of the priorities established by Movants. However, this selection of priorities does not demonstrate a lack of due diligence or contemptuous conduct.

If Movant Aprile has to divide his time between this appeal and other equally serious trials, he also makes time

priority allocations which are not the result of disrespect or in reckless disregard of this Court's Order. There are only so many hours in a day. This Court of Justice encompasses the entire judicial system of the Commonwealth. The Department of Public Advocacy has duties at the Circuit Court level as well as at the Supreme Court. Where there are not enough attorneys available, justice at some level will be inevitably delayed. This delay does not constitute contemptuous conduct on the part of these two individuals.

The Court found "counsel's explanations as to case load inadequate to explain their lack of effort" on this case. This may be valid criticism of the priorities adopted by the Movants regarding the use of their time, but this does not constitute finding of facts constituting disrespect of this court. The Court may well feel that the briefs to this Court deserve the top priority to the neglect of duties in other courts of this Commonwealth. However, those other courts have contempt powers too and these dedicated Public Advocates are placed in a no win situation. By way of example, the court is surely aware of similar deadlines placed on these Movants in the Moore, Johnson and Askew cases. Movants cannot meet all these deadlines at once. The problem might better be addressed with the establishment of a priority schedule or system.

Movants believe the Court's use of its contempt power in this situation will make the problem worse. No matter how dedicated a young Public Advocate may be, he or she is not going to remain long in a job and risk contempt of court for time delays under circumstances where compliance with all demands is simply impossible. The threat of contempt for lack of diligence to a lawyer who is already working unpaid overtime will surely discourage diligent young lawyers from taking opportunities in the Office of

the Public Advocate. Justice will certainly not be served by such a result.

The Order entered by this Court violates the guarantees of Due Process of law to the Movants under the Fourteenth Amendment to the United States Constitution by failing to observe minimal presumptions of law as well as standards and burdens of proof in the adjudication of contempt of court. The Movants were certainly entitled to know prior to their acts what sort of conduct amounted to criminal contempt. Movants believed that a demonstration of work load over which they had no control would be sufficient, as it has been in the past, to justify failure to file such briefs and to be allowed an extension of time. The Court has changed the rules in mid-stream and imposed contempt penalties upon these Movants in situations which have heretofore been tolerated. Accordingly, the failure to give defendants adequate notice of the type of action which would be found contemptuous is a Due Process denial.

The standard of proof adopted by the court in order to find the actions of the Movants in contempt is not made clear in the Opinion and Order. We presume from previous cases that such conduct must involve acts disrespectful of the Court, but the Opinion and Order nowhere defines the elements of the offense or makes factual findings in this regard. Furthermore, the standard of proof itself, whether it is beyond a reasonable doubt or clear and convincing or some other standard is not made clear. The Rules of Civil Procedure, 52.01, and Criminal Procedure, 9.26(2) require specific findings of facts and conclusions of law. Failure to follow the court's own rules constitutes a Due Process denial.

It is a violation of the Movants' right of Due Process for the Court to fail in its Order to specifically identify those acts of the Movants which constituted criminally contemptuous conduct and to indicate the manner in which those

acts were found to be an act intentionally disrespectful of the Court or its process.

It is quite easy in this case to write an Opinion very embarrassing to the Movants, pointing out that after a ten month delay the entire record had not yet been read by one of the appellate attorneys. It is also easy to suggest contempt by simply saying that the Movants' explanations of work overload and the burdens of other cases are not adequate. Such an Opinion will certainly serve to embarrass and humiliate the Movants unnecessarily, but it will not alleviate the problems of work overload in the Office of Public Advocacy. Nor will it prevent these same problems from occurring again.

CONCLUSION

We move this Court to reconsider and modify its Opinion and Order. We urge that the Opinion and Order be redirected to the real source of the problem, the burden of overload upon these Public Advocates. If sanctions are necessary, the Court should adopt methods other than contempt of court in order to draw to the attention of practitioners generally the problems of extended delays in filing appellate briefs and in waiting until the last minute to make motions for additional time. Movants believe due process requires that they be given prior notice that last minute motions for extension of time will be considered contemptuous and that requests for extension of time similar to those which have been granted in other cases, for the very same reasons, will also be considered contemptuous. The failure to make the contemptuous nature of such practice clear prior to imposing contempt violations is improper. Movants believe that even with notice that such conduct will be considered contemptuous, the underlying problem will not be solved. In all events, however, the contempt citations against these particular Movants

should be withdrawn and the Opinion and Order appropriately modified.

(s) Robert C. Ewald
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(502) 589-5235
Counsel for Movants

CERTIFICATE

I certify that a copy of the foregoing pleading was mailed, first class mail, postage prepaid, this 18th day of August, 1986, to David L. Armstrong, Attorney General, State Capitol, Frankfort, Kentucky 40601 and to David A. Smith, Assistant Attorney General, State Capitol, Frankfort, Kentucky 40601.

(s) Robert C. Ewald

SUPREME COURT OF KENTUCKY

84-SC-566-MR

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Henry Circuit Court
No. 83-CR-057
(Hon. Dennis A. Fritz, Judge)

ORDER DENYING MOTION FOR RECONSIDERATION
ORDER MODIFYING OPINION

Appellant's motion for reconsideration is denied and the opinion and order rendered by this court on August 7, 1986, is modified on its face.

ENTERED September 25, 1986.

(s) Robert F. Stephens
Chief Justice

All sitting.

Stephens, C.J., and Leibson, Stephenson and Wintersheimer, JJ., concurring. Vance, J., would impose sanctions, but without a finding of contempt. Gant, J., dissents in a separate dissenting opinion and is joined by White, J.

ENTERED August 7, 1986.

(s) Robert F. Stephens
Chief Justice

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SUPREME COURT OF KENTUCKY

84-SC-566-I

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Henry Circuit Court
No. 83-CR-057
(Hon. Dennis A. Fritz, Judge)

MOTION TO VACATE THE FINDING OF CONTEMPT OF COURT—Filed October 6, 1986

This Motion to Vacate the finding of contempt of court contained in this Court's Opinion and Order entered August 7, 1986, and modified by this Court's Order of September 25, 1986 is filed by J. Vincent Aprile, II, and Julie Namkin, by the undersigned counsel. In its Opinion and Order, as modified, this Court, by a 4-3 vote, found the Movants in contempt of court for failure to show cause why their brief in this action was not timely filed pursuant to the Court's earlier Order.

In the original Opinion and Order of August 7, 1986, five Justices of this Court—Chief Justice Stephens and Justices Leibson, Stephenson, Vance and Wintersheimer concurred in the finding that both J. Vincent Aprile II and Julie Namkin were in contempt of court. Justice Gant and White dissented and found no contempt of court. In the Opinion and Order of August 7, 1986, by a vote of 5-2, this Court found Mr. Aprile and Ms. Namkin in contempt of court.

On September 25, 1986 this Court entered an Order Denying Motion for Reconsideration and Modifying Opinion in which Justice Vance, in a change of position, voted to "impose sanctions, but without a finding of contempt." As a result of this modification of the Opinion and Order of August 7, 1986, this Court found Mr. Aprile and Ms. Namkin in contempt of court by a vote of 4-3, even though five Justices would impose sanctions.

As noted in the Motion for Reconsideration filed previously in this case, the standard of proof applied by the court in this case, whether it is beyond a reasonable doubt or clear and convincing evidence or some other standard, is not made clear. The applicable standard of proof in a criminal contempt case is beyond a reasonable doubt. "Without deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911). *See also Michaelson* v. *U. S.*, 266 U. S. 42 (1924); *Blackard* v. *State*, 217 Ark. 661, 232 S. W. 2d 977 (1950); *Brannon* v. *Commonwealth*, 162 Ky. 350, 172 S. W. 703 (1915).

Further, Movants contend that the standard of proof beyond a reasonable doubt is not satisfied in this case because only four of the seven justices found that he was guilty of contempt. Ultimately, Justices Stephens, Leibson, Stephenson and Wintersheimer found that Movants were guilty of contempt. Justice Vance believed that sanctions were warranted, but without a finding of contempt. Justices Gant and White dissented and found no contempt.

While it is true that unanimous verdicts are not constitutionally required in state criminal trials, a 4-3 verdict does not satisfy the requirement of a finding of guilt beyond a reasonable doubt. In *Apodoca* v. *Oregon*, 406 U. S. 404

(1972), and *Johnson* v. *Louisiana*, 406 U. S. 356 (1972), the Supreme Court held that jury verdicts of 11-1 and 10-2 were not automatically invalidated. In his *Johnson* concurrence, however, Justice Blackmun expressed the view that verdicts of less than a substantial majority would possibly not withstand attack. Justice Blackmun stated: "I do not hesitate to say, either, that a system employing a 7-5 standard, rather than, a 9-3 or a 75% minimum, would afford me great diffcult." *Johnson*, 406 U. S. at 366. The 4-3 decision in this case simply cannot be said to demonstrate a finding beyond a reasonable doubt that Movants were guilty of criminal contempt.

"The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'" *Addington* v. *Texas*, 441 U. S. 418, 423 (1979), quoting *In re Winship*, 397 U. S. 358, 370 (1970), (Harlan, J., concurring). "The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." *Addington, supra* at 423. "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual liberty.'" *Addington, supra* at 425 (citation omitted). "[T]he function of legal process is to minimize the risk of erroneous decisions." *Id.*

The validity of these general principles of federal constitutional law are reflected in the day-to-day practice in the courts of Kentucky.

In Kentucky "the agreement at least three-fourths (¾) of the jurors is required for a verdict of all civil trials by jury in circuit court," while "[t]he agreement of at least five sixths (5/6) of the juriors is required for a verdict in

all civil trials by jury in district court." KRS 29A.280(3). *See* Sec. 248, Ky. Const. Agreement of 75 percent and 83 percent of the fact-finders in civil cases in the circuit courts and district courts of the Commonwealth, respectively, is a far cry from 57 percent agreement of the fact-finders in the instant case which resulted in the finding of contempt of court.

In Kentucky as the number of fact-finders decreases from twelve in circuit court to six in district court, the percentage of agreement among fact-finders for a verdict increases from 75 percent to 83 percent. *See Burch* v. *Louisiana,* 441 U. S. 130, 134 (1979), where conviction by a nonunanimous six-member jury in a state trial for a nonpetty offense deprives an accused of his constitutional right to trial by jury.

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U. S. 307 (1979). The bare majority vote of 4-3 by an appellate court serving as initial fact-finder on the question of whether movants' conduct constituted contempt of court demonstrates a constitutional deficiency in the sufficiency of the evidence marshalled against the movants.

CONCLUSION

For the foregoing reasons, we move this Court to vacate its finding of contempt of court in its Opinion and Order, as modified.

It is fundamentally unfair and violative of due process to be subject to an order which does not specify the elements of the offense and the standard of proof applied or make specific findings of fact and conclusions of law.

Further, there is simply not enough weight in a 4-3 decision to support a finding of guilt beyond a reasonable doubt. In all events, however, the contempt citations against these two partciular Movants should be vacated and withdrawn.

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CERTIFICATE

I certify that a copy of the foregoing pleading was mailed, first class mail, postage prepaid, this 6th day of October, 1986, to David L. Armstrong, Attorney General, State Capitol, Frankfort, Kentucky 40601 and to David A. Smith, Assistant Attorney General, State Capitol, Frankfort, Kentucky 40601.

(c) Robert C. Ewald by JVA II
Robert C. Ewald

SUPREME COURT OF KENTUCKY

84-SC-566-I

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

On Appeal from Henry Circuit Court
Honorable Dennis A. Fritz, Judge
83-CR-057

ORDER

The motion of Honorable J. Vincent Aprile, II, and Honorable Julie Namkin to vacate the finding of contempt of court contained in this Court's Opinion and Order entered August 7, 1986 and modified by this Court's Order entered September 25, 1986, is denied.

Stephens, C.J., and Gant, Stephenson, Vance, White and Wintersheimer, JJ., sitting. All concur.

Leibson, J. not sitting.

ENTERED October 31, 1986.

(s) Robert F. Stephens
Chief Justice